TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 23

WILLIAM FOX, PETITIONER,

vs.

CAPITAL COMPANY, A CALIFORNIA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No.

WILLIAM FOX, PETITIONER,

vs.

CAPITAL COMPANY, A CALIFORNIA CORPORATION

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vs.

CAPITAL COMPANY, A CALIFORNIA CORPORATION

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SUBPŒNA

The President of the United States of America to William Fox, Greeting:

Whereas a judgment in the sum of $297,412.91 was recovered by Capital Company, a California corporation, against William Fox in the United States District Court, Southern District of New York, on July 18, 1935, and entered and docketed in the office of the Clerk thereof on said date, now, therefore,

We command you, that all and singular business and excuses being laid aside, you appear in your proper person before one of the Judges of the District Court of the United States for the Southern District of New York in the Second Circuit, at Room No. 235, United States Court Rooms and Old Post Office Building, Broadway and Park Row, in the Borough of Manhattan, City of New York, on Tuesday, Oct. 15th, 1935, at 10:30 o'clock in the forenoon of the same day to testify and be examined under oath, to all and singular concerning your property, income, rights and credits, any and all of your assets, or other means for satisfying such judgment.

In the Matter of Supplementary Proceedings instituted in the District Court of the United States, for the Southern District of New York, wherein Capital Company, a California corporation, is the Judgment-Creditor, and William Fox is the Judgment-Debtor,

on the part of the Judgment-Creditor.

And this you are not to omit, under the penalty upon you of Two Hundred and Fifty Dollars, and for a failure to attend you will be guilty of a contempt of Court.

Witness, Hon. John C. Knox, Judge of the District Court of the United States, for the Southern District of New York, at the City of New York, the 28th day of September, 1935.

Charles Weiser, Clerk. (Seal.)

Cravath, de Gersdorff, Swaine & Wood, Attorneys for Judgment-Creditor, Office and Post Office Address, No. 15 Broad Street, New York, N. Y.

O. K. J. A. C.

Civil Practice Act Section 781. Transfer of Property by Judgment Debtor or Third Party Enjoined.—Upon the service of the subpœna upon the judgment debtor or any third party who has in his or its possession property or moneys belonging to the judgment debtor or claimed by the receiver of the said judgment debtor or who is indebted to the judgment debtor, such judgment debtor or third person is hereby forbidden to transfer, pay over or otherwise dispose of such moneys or property belonging to the judgment debtor or thereafter acquired by or becoming due to him, not exempt by law from application to the satisfaction of the judgment, until the further order of the court. Any person served with said subpœna, who shall violate the provisions of such restraining provision, shall be subject to punishment by the court by fine and imprisonment or either, as and for a contempt. To effect such restraining provision, a copy of this section must be endorsed upon the copy of the subpœna served under this article.

[fol. 2] In United States District Court, Southern District of New York

Capital Company, a California Corporation, Judgment-Creditor,

against

William Fox, Judgment-Debtor

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

J. Morman, being duly sworn, deposes and says:

On October 8, 1935, I served the within subpœna on William Fox, the judgment-debtor in the above proceeding, at Frankford Junction, Pennsylvania, on Pennsylvania Railroad train #1016 in car #141 (Bushrod), by delivering to and leaving personally with him a true copy thereof and

at the same time exhibiting and reading to him the within original subpoena.

I knew the said William Fox to be the individual mentioned and described in the aforesaid subpœna.

J. Morman.

Sworn and subscribed before me this 11th day of October, 1935. Della M. Cloud, Notary Public. My Commission expires March 9, 1939. (Seal of Della M. Claud, Notary Public. Phila., Pa.)

O. K. J. A. C.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF SERVICE OF ORDER TO SHOW CAUSE

STATE OF NEW YORK,
County of New York, ss:

Charles N. Fiddler, being duly sworn, deposes and says that on November 9, 1935, he served the within order to show cause and affidavit on William Fox, the judgment-debtor, personally, at Indiana Avenue opposite the Hotel Claridge in Atlantic City, New Jersey, by leaving a true copy of said order and affidavit with the said William Fox and at the same time exhibiting to him the original thereof, and informing him of the nature of its contents.

Charles N. Fiddler.

Sworn to before me this 13th day of November, 1935. Arthur Newman, Notary Public, etc. (Notarial Seal.)

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER TO SHOW CAUSE

Upon reading and filing the annexed affidavit of Samuel B. Stewart, Jr., sworn to the 1st day of November, 1935, and

upon the subpœna dated and issued on September 28, 1935, directing William Fox, the judgment-debtor herein, to testify and be examined under oath in supplementary proceedings, and upon the default noted thereon, and it appearing that the judgment-debtor's misconduct in disobeying said subpœna, by not appearing for examination on October 15, 1935, the date specified therein, was calculated to and did impede, impair and prejudice the rights and remedies of the judgment-creditor, it is on motion of Cravath, de Gersdorff, Swaine & Wood, attorneys for the judgment-creditor herein.

Ordered that William Fox, the judgment debtor herein, show cause before one of the judges of this Court at a term for motions thereof in Room No. 235, United States Court Rooms and Old Post Office Building, Broadway and Park [fol. 5] Row, in the Borough of Manhattan, City of New York, on the 15th day of November, 1935, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why he should not be punished for a civil contempt of court for his failure to appear in obedience to a subpœna directing him to testify and be examined under oath in supplementary proceedings, and why said judgment-creditor should not have such other, further and different relief as to the Court may seem just and proper.

Let service of a copy of this order and of the annexed affidavit if made upon the judgment-debtor on or before November 13th, 1935, be deemed sufficient service.

Dated New York, N. Y., November 1, 1935.

Henry W. Goddard, U. S. D. J.

[fol. 6] In United States District Court, Southern District of New York

[Title omitted]

Affidavit of Samuel B. Stewart, Jr.

State of New York,
County of New York, ss:

Samuel B. Stewart, Jr., being duly sworn, deposes and says:

I am an attorney and counsellor at law associated with Cravath, de Gersdorff, Swaine & Wood, attorneys for the

judgment-creditor herein, and I am duly authorized to conduct this proceeding.

A subpœna was issued herein on September 28, 1935, directing William Fox, the judgment-debtor, to appear before one of the Judges of this Court at Room No. 235, United States Court Rooms and Old Post Office Building, Broadway and Park Row, in the Borough of Manhattan, City of New York, on October 15, 1935, at 10:30 A. M. to testify and be examined under oath in supplementary proceedings concerning his property, income, rights and credits, any [fol. 7] and all of his assets or other means for satisfying the judgment recovered by the judgment-creditor in this Court on July 18, 1935 against said William Fox.

As appears from the proof of service annexed thereto, said subpœna was served on October 8, 1935, upon said William Fox who, I am informed and believe, then resided and still resides at 277 Park Avenue, Borough of Manhattan, New York City, in this District and then maintained and still maintains another place of residence at Woodsburgh, Long Island, in the Eastern District of New York.

Said William Fox failed to appear on the date upon which he was directed by said subpœna to appear, whereupon his default was duly noted. Deponent is of the opinion that the default of said William Fox was wilful. Said default was calculated to and actually did impede, impair, prejudice and defeat the rights and remedies of the judgment-creditor.

No previous application has been made for the relief herein sought.

Wherefore, your deponent respectfully requests that an order be made directing said William Fox to show cause before one of the judges of this Court, why he should not be punished for contempt of court.

Samuel B. Stewart, Jr.

Sworn to before me this 1st day of November, 1935.
Walter P. Hickey, Notary Public, Kings County.
(Notarial Seal.)

O. K. J. A. C.

[fol. 8] Endorsed: Motion Cal. No. 54. Date Oct. 15, 1935. Henry W. Goddard. The default of the Judgt. Debtor is hereby noted. H. W. G., U. S. D. J.

[fol. 9] Endorsed—"The proceedings supplementary to execution (pursuant to common law Rule 5 of this Court) were ancillary to the original action in this Court. See Sherman Bank v. Schubert Theatrical Co., 238 Fed. 225, 228; they therefore could be instituted by the service of a subpoena outside of the territorial limits of this district. See Lerman v. Krenther-Arnold HingeLast Co. 284 U. S. 448; 3 Cyc. of Fed. Proc. Sec. 750 and the order to show cause why the defendant should not be punished for contempt could likewise be served beyond the territorial limits of this district. See Lerman case supra.

"Motion is therefore granted with leave to defendant to purge himself of the contempt by submission to examination. Settle order on notice.

Wm. Bondy, U. S. D. J.

Dec. 2, 1935."
O. K. J. A. C.
Filed Dec. 3, 1935.

[fol. 10] In United States District Court, Southern District of New York

[Title omitted]

Affidavit of Samuel B. Stewart, Jr.

State of New York,
County of New York,
Southern District of New York, ss:

Samuel B. Stewart, Jr., being duly sworn, deposes and says:

I am an attorney and counsellor-at-law associated with the firm of Cravath, de Gersdorff, Swaine & Wood, attorneys for the judgment-creditor, Capital Company, in the above-entitled proceedings. I am making this affidavit in support of the motion of said judgment-creditor to punish the judgment-debtor, William Fox, for contempt of court in wilfully disobeying and disregarding a subpoena of this Court served within the jurisdiction of this Court.

When this motion was originally returnable on Friday, November 22, 1935, a representative of the firm of Hirsh, Reass, Newman & Becker appeared and orally put in a special appearance for the judgment-debtor "for the pur-

pose of attacking the jurisdiction of this Court to make the order sought upon this motion", and requesting adjournment of the motion to Tuesday, November 26, for the purpose of preparing affidavits in support of such attack upon [fol. 11] this Court's jurisdiction. Your deponent therefore deems it proper also to submit an affidavit as to the facts upon which the jurisdiction of the Court depends.

The subpœna, for disregard of which it is claimed Mr. Fox is now in contempt of court, was served upon him on a railroad train on the Pennsylvania Railroad entering the City of Philadelphia, Pennsylvania, at the suburban station known as Frankford Junction, Pennsylvania. According to "The Official Guide of the Railways and Steam Navigation Lines of the United States", published by National Railway Publication Company, 424 West 33rd Street, New York City, the distance by the Pennsylvania Railroad from Pennsylvania Station, New York City, to Frankford Junction, Pennsylvania, where this subpœna was served, is 82.6 miles. As the distance from the Court House of this Court to Pennsylvania Station is not in excess of four miles by any possible means of conveyance, it is apparent that the subpœna in question was served upon the judgment-debtor, William Fox, well within the 100 mile jurisdictional limit of this Court.

The act of Mr. Fox in disregarding this subpœna is merely the climax of a long series of acts in this litigation openly contemptuous of the authority of this Court and of its ability to enforce its judgments. The facts hereinafter stated may be verified by reference to the records of this Court in this case, in which a judgment for the sum of $297,412.91 was entered upon a verified confession of the defendant on July 18, 1935.

After execution issued upon such judgment had been returned unsatisfied, the judgment-creditor secured an order in supplementary proceedings dated August 7, 1935, [fol. 12] directing this judgment-debtor to appear on August 27, 1935, in this Court for examination under oath concerning his property pursuant to Rule V of the Common Law Rules of this Court and Article 45 of the New York Civil Practice Act. This order and a subpoena issued pursuant thereto were served on the judgment-debtor, William Fox, on August 19, 1935, at the Hotel Claridge in Atlantic City, New Jersey. The judgment-debtor did not appear

pursuant to such subpœna and order but made a motion through his attorneys, Messrs. Hirsh, Newman, Reass & Becker, upon an affidavit of Daniel G. Rosenblatt, a member of that firm, to set aside such service on three grounds:

(1) That no service of a subpœna or order in supplementary proceedings issued out of this Court is valid if served outside the State of New York;

(2) That the subpœna so served on August 19, 1935, was invalid because issued by the Clerk of the Court prior to service of an order in supplementary proceedings;

(3) That the papers there in question were served upon Mr. Fox at a distance of more than 100 miles from the Court House of this Court.

This Court (Judge Patterson) apparently rejected the first two grounds of the motion but vacated the service upon the sole ground that the place of service, although within 100 miles of this Court House by direct air line, exceeded 100 miles "by ordinary and usual route of public travel". His memorandum decision as filed on September 12, 1935, is quoted in full as follows:

"The reference to 100 miles in relation to subpœnas for persons outside of the district (28 U. S. C. A. 654) refers to the distance by the ordinary, usual and shortest route of [fol. 13] public travel and not to the distance as a crow flies. See Jennings v. Menaugh, 118 Fed. 612 (C. C. Ind.), Green v. Victor Talking Machine Co., 15 Fed. (2d) 869 (D. C. N. Y.). An early case to the contrary, Parker v. Bigler, 18 Fed. Cas. No. 10726, cannot be accepted. Since it is clear from the proofs before me that the distance from the Court House in New York City to Atlantic City, N. J., where service of subpœna was attempted, exceeds 100 miles by ordinary and usual route of public travel, the service was void and must be set aside. The fact that by air the distance is only 97 miles and that an airplane could be hired to make a special trip cannot be considered. A motion of the judgment debtor will, accordingly, be granted."

In the case of this earlier subpœna, therefore, this judgment-creditor was temporarily frustrated and delayed in the collection of this judgment merely by reason of the fact that the judgment-debtor had gone to a point more than 100 miles by railroad or automobile route from New York City, as soon as the judgment had been entered and

before a subpœna directing his appearance in supplementary proceedings could be served upon him within 100 miles of this Court. A recital of the history of this litigation makes it clear that this trip, as well as his present disregard of a subpœna served upon him in Frankford Junction, Pa., were deliberate and wilfull evasions of the process of this Court.

The judgment, pursuant to which these proceedings supplementary to judgment have been commenced, is based upon an indebtedness for rent upon a theatre in San Francisco, California, payment of which rent was guaranteed in writing by this judgment-debtor. After numerous demands over a period of months had failed to produce any satisfactory arrangement for the payment of this obligation your deponent was instructed by the judgment-creditor to commence action against this judgment-debtor to recover the sums due. Although this judgment-debtor was conceded to be domiciled in this State and to have a place of [fol. 14] residence in the Borough of Manhattan, City of New York, in this District, and another place of residence in the County of Nassau in the Eastern District of New York, and although his present attorneys, Messrs. Hirsch, Newman, Reass & Becker, were informed by your deponent of the desire to serve Mr. Fox and although three process servers including one Deputy United States Marshal made numerous efforts to effect service upon him it was only after such efforts had been continued for a period of approximately two months and after a proposed order for substituted service had been prepared for signature by the Court and the judgment-debtor's attorneys informed of this fact that they consented to put in an appearance for him in the action.

Then after the service of the complaint Mr. Fox's attorneys asked for all the time to answer that your deponent would give them. Shortly after receiving an answer on behalf of Mr. Fox your deponent made a motion for summary judgment in this Court which was adjourned for a long period of time pending negotiations between Mr. Fox and the judgment-creditor and which was ultimately withdrawn upon the execution by Mr. Fox of a confession of judgment for the full amount of the claim. This confession of judgment was executed by Mr. Fox on May 3, 1935, in connection with a stipulation between the attorneys that judgment should not be entered prior to July 13, 1935, which

stipulation was granted by your deponent upon the assurances of the judgment-debtor and his attorneys that efforts were being made to work out a reorganization of the judgment-debtor's affairs which would make possible a payment of the judgment in full by July 13, 1935.

[fol. 15] A few days prior to July 13, 1935, an officer of the judgment-creditor communicated with your deponent stating that Mr. Fox had been in direct communication with certain other officers of the judgment-creditor in California attempting to arrange a further delay of the judgment day. Your deponent was informed and believes that such negotiations fell through, however, and consequently your deponent's firm was instructed to enter the judgment which was done on July 18, 1935, and an application by the judgment-debtor's attorneys to vacate this judgment was refused by Judge Bondy of this Court.

Your deponent is further informed and believes that on July 17, 1935, the judgment-debtor was testifying in an examination before trial in another action and that such examination was taking place in Mineola, Long Island, in the Eastern District of New York and well within 100 miles of this Court House; that substantially coincident with the entry of this judgment, however, that examination was adjourned to the Hotel Claridge in Atlantic City, New Jersey. It was during the course of one of the hearings on this examination at the Hotel Claridge, as your deponent is informed and believes, that service upon Mr. Fox of the subpœna set aside by Judge Patterson was finally effected.

Following the decision of Judge Patterson, a new subpœna in supplementary proceedings was issued by this Court on September 28, 1935, directing the judgment-debtor to appear in this Court for examination on Tuesday, October 15, 1935. This is the subpœna which was served upon the judgment-debtor on a railroad train entering the City of Philadelphia at a point which was 82.6 miles from Pennsylvania Station, New York City, and well within 100 miles [fol. 16] of this Court House, on October 8, 1935, seven days before the return day of said subpœna. Although this service complied in all particulars with the requirements prescribed by Judge Patterson in his decision setting aside the previous service, the judgment-debtor neither appeared nor moved to set aside such subpœna, but failed to answer when his name was called in open court on the return day of the subpœna, at which time your deponent was present

and prepared to examine him. His default was duly noted on the back of the affidavit of service attached to the original subpœna, which affidavit and subpœna are submitted in support of this motion.

The judgment-creditor's attorneys then secured the order to show cause upon which this motion is made on November 1, 1935, and, as appears from the affidavit of Charles N. Fiddler, also submitted in support of this motion, this order to show cause was personally served upon the judgment-debtor, William Fox, on Indiana Avenue in Atlantic City, New Jersey, on November 9, 1935.

The judgment-debtor has persistently refused to appear at any time or place for the purpose of giving testimony respecting his assets and has resorted to every known technicality to avoid the necessity of such appearance. On the basis of the autorities cited in the memorandum handed to the Court herewith, it is submitted that the subpoena served on him in Frankford Junction, Pennsylvania, and the order to show cause why he should not be punished for contempt of court served on him in Atlantic City, New Jersey, comply with every known technicality of the law and that the judgment-debtor, for his contemptuous disregard of the legal [fol. 17] process of this Court, should be duly punished and allowed to purge himself of his contempt only by a prompt appearance for full and complete testimony respecting his assets to enable this judgment-creditor to collect the judgment duly awarded by this Court five months ago.

Samuel B. Stewart, Jr.

Sworn to before me this 18th day of November, 1935.
John F. Harding, Notary Public. (Seal.)

O. K. J. A. C.

[fol. 18] In United States District Court, Southern District of New York

[Title omitted]

Affidavit of Charles N. Fiddler

State of New York,
County of New York,
Southern District of New York, ss:

Charles N. Fiddler, being duly sworn, deposes and says:

I am an attorney and counselor at law and a member of the Bars of the States of New Jersey and New York, and

of this Court. I am attorney of record for Capital Company in an action brought by that Company in the New Jersey Supreme Court for Atlantic County to recover an unpaid balance of $227,096.97 plus appropriate interest, remaining due and unpaid on the judgment of $297,412.91 entered by this Court on July 18, 1935. This action was commenced by service of a summons and complaint upon the judgment-debtor William Fox in the State of New Jersey on September 14, 1935. On September 20, 1935, William Fox appeared in said action by an attorney who served a demand that plaintiff deposit security for costs and who subsequently, on October 4, 1935, served a demand for a bill of particulars, consisting of twenty-six separate items. A bill of particulars has not yet been served pursuant to [fol. 19] such demand and under New Jersey practice an answer is not required to be filed in an action where a demand for a bill of particulars has been served by defendant, until a bill of particulars has been served. No answer, therefore, has yet been filed in the action and no defense interposed.

Charles N. Fiddler.

Sworn to before me this 20th day of November, 1935.
Walter P. Hickey, Notary Public, Kings County.
(Notarial Seal.)

O. K. J. A. C.

[fol. 20] In United States District Court, Southern District of New York

[Title omitted]

Affidavit of Daniel G. Rosenblatt

State of New York,
County of New York, ss:

Daniel G. Rosenblatt, being duly sworn, deposes and says:

I am a member of the firm of Hirsh, Newman, Reass and Becker, attorneys, appearing specially herein for the judgment-debtor, for the purpose of contesting the validity of the service of subpœna in Supplementary Proceedings and

further contesting the validity of the service of the motion to punish the judgment-debtor for contempt, and for no other purpose, and without submitting to the jurisdiction of this Court.

As explained upon the argument of the motion, the basic facts upon this motion are conceded. However, plaintiff has so interwoven these facts with a bitter attack on the judgment-debtor that it is advisable briefly to restate such facts as are relevant as well as conceded.

On August 19, 1935, the judgment-creditor served the judgment-debtor with an order and subpoena in Supple-
[fol. 21] mentary Proceedings. Such service was made upon the judgment-debtor at the Hotel Claridge, in Atlantic City, New Jersey, where he then was and now is residing. A motion was made by order to show cause, dated August 25, 1935, to vacate the aforesaid service. The grounds in support of that motion were:

(1) Supplementary proceedings are special proceedings and can only be commenced by the service of process within the territorial limits of the United States District Court for the Southern District of New York.

(2) The rules of this Court permitting the service of a subpœna within one hundred miles from the courthouse apply only to subpœnas in pending proceedings and apply only to witnesses and not to parties.

(3) That in any event, Atlantic City, New Jersey is more than one hundred miles from the courthouse.

The motion came on for hearing before Judge Patterson, who granted the motion. A copy of Judge Patterson's opinion is annexed hereto as "Exhibit A". A copy of the order entered upon that motion is annexed hereto as "Exhibit B".

The significance of this decision and the order entered thereon is discussed in the memorandum submitted herewith.

Thereafter, and on October 8, 1935, the judgment-creditor served the judgment-debtor with a subpœna in supplementary proceedings, on a railroad train at Frankfort Junction on the outskirts of Philadelphia, Pennsylvania. Such service being equally void, the judgment-debtor did not appear. A copy of that subpoena is annexed hereto as "Exhibit C".

The plaintiff's motion is now made to punish the judgment-debtor for a civil contempt for failing to obey the [fol. 22] said subpœna which was served upon him in Philadelphia, Pennsylvania, outside the territorial limits of the United States District Court, Southern District of New York.

The motion papers to punish the judgment-debtor for contempt were served at the debtor's residence at the Hotel Claridge, Atlantic City, New Jersey.

As explained to the Court upon the argument of the motion, Mr. Fox is admittedly undergoing hospitalization and treatment for a serious illness at Atlantic City, New Jersey.

Furthermore, in a suit instituted against Mr. Fox in the State of New Jersey upon this judgment that was entered in the United States District Court, Southern District of New York, that suit is being defended on the ground that the amount of the judgment has been paid.

It is submitted, therefore, that the equities in this proceeding are with the judgment-debtor.

It is further submitted that the decision upon this motion must rest purely on the legal insufficiency of the attempted services and that therefore the motion to punish the debtor for contempt must be denied.

Wherefore, your deponent respectfully prays that the motion of the judgment-creditor to punish the judgment-debtor for contempt be denied.

Daniel G. Rosenblatt.

Sworn to before me this 20th day of November, 1935.
Edward M. Brandriss, Notary Public, Bronx County.

[fol. 23] EXHIBIT "A" TO AFFIDAVIT

#635

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L 59-192

In the Matter of Supplementary Proceedings of CAPITAL COMPANY, a California Corporation, Judgment-Creditor,

against

WILLIAM FOX, Judgment-Debtor

Memorandum

PATTERSON, D. J.: The reference to 100 miles in relation to subpœnas for persons living outside the district (28 U. S. C. A., Section 654) refers to the distance by the ordinary, usual and shortest route of public travel, and not to the distance as the crow flies. See Jennings v. Menaugh, 118 Fed. 612 (C. C. Ind.), Green v. Victor Talking Machine Co., 15 Fed. 2nd, 869 (D. C. N. Y.). An early case to the contrary, Parker v. Bigler, 18 Fed. Cas. 10, 726, cannot be accepted. Since it is clear on the proofs before me that the distance from the court house in New York City to Atlantic City, New Jersey, where service of subpœna was attempted, exceeds 100 miles by any ordinary and usual route of public travel, the service was void and must be set aside. The fact that by air the distance is only 97 miles and that an airplane could be hired to make a special trip cannot be considered. The motion of the judgment-debtor will accordingly be granted.

Robert P. Patterson, United States District Judge.

September 9, 1935.

[fol. 24] EXHIBIT "B" TO AFFIDAVIT

At a stated term of the United States District Court for the Southern District of New York, held in the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 19th day of September, 1935.

Present: Hon. Robert P. Patterson, U. S. D. J.

In the Matter of Supplementary Proceedings of CAPITAL COMPANY, a California Corporation, Judgment-Creditor,

against

WILLIAM FOX, Judgment-Debtor

The judgment-debtor, William Fox, having moved this Court by order to show cause dated August 26, 1935, for an order vacating and setting aside the service of the affidavit and order in supplementary proceedings herein dated August 7, 1935, and the subpœna dated August 9, 1935,

Now, on reading and filing the said order to show cause dated August 26, 1935, and the affidavit of Daniel G. Rosenblatt, sworn to August 26, 1935, annexed thereto, with due proof of service thereof on the attorneys for the judgment-creditor herein, and the reply affidavit of Daniel G. Rosenblatt, sworn to August 29, 1935, with due proof of service thereof on the attorneys for the judgment-creditor, all in support of the motion; and the affidavit of Samuel B. Stewart, Jr., sworn to August 27, 1935, in opposition thereto, and after hearing Hirsh, Newman, Reass & Becker (Daniel G. Rosenblatt, of counsel), attorney for the judg- [fols. 25 & 26] ment-debtor William Fox, appearing specially herein for the purpose of contesting the validity of the service of the affidavit, order and subpœna in supplementary proceedings herein, and for no other purpose, in support of the motion, and Cravath, de Gersdorff, Swaine & Wood, Esqs., (Samuel B. Stewart, Jr., of counsel), attorneys for the judgment-creditor, in opposition thereto, and the court having filed its opinion herein, it is

Ordered, that the motion of the judgment-debtor be and the same hereby is in all respects granted; and it is further

Ordered, that the service of the aforesaid affidavit and order in supplementary proceedings, dated August 7, 1935, and the subpœna dated August 9, 1935, upon the judgment-debtor herein, be and the same hereby is vacated and set aside.

Robert P. Patterson, U. S. D. J.

[fol. 27] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF SAMUEL B. STEWART, JR.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Samuel B. Stewart, Jr., being duly sworn, deposes and says:

I am an attorney and counsellor-at-law associated with the firm of Cravath, de Gersdorff, Swaine & Wood, attorneys for the judgment-creditor herein, and I am familiar with the facts herein. This affidavit is submitted in connection with the settlement of the order of this Court herein adjudging the judgment-debtor William Fox in contempt of court, and its purpose is to present certain facts bearing upon the amount of the fine which should be properly fixed [fol. 28] as the penalty for such contempt of court.

The effect of said contempt of court has been seriously to defeat, impair, impede and prejudice the rights and remedies of the judgment-creditor herein in the collection of the judgment in the sum of $297,412.91 entered in its favor by this Court on July 18, 1935, upon a confession of judgment theretofore executed by this judgment-debtor. I am informed and verily believe that no part of said judgment has been paid except that there has been credited and realized on account thereof the sum of $70,315.94, which sum includes:

$604.64 paid on account of rent on May 8, 1935;
11.92 interest thereon from May 8, 1935, to and including July 18, 1935, date of entry of judgment;
2,491.03 premium on Owners' Landlords and Tenants Insurance Policy;
53.51 interest thereon from March 29, 1935, to and including July 18, 1935;
9.00 adjustment of interest on taxes;
881.99 personal property taxes paid;
3.05 interest thereon from July 1, 1935, to and including July 18, 1935;

49,246.50 proceeds of sale on August 26, 1935, of chattels pledged as security for defendant's obligations;

5,000.00 proceeds of sale on August 26, 1935, of stock pledged as security for defendant's obligations;

11,536.96 paid by United States Fidelity and Guaranty Company, of Maryland, on July 30, 1935;

477.34 collected under execution levied against bank account maintained by defendant in Bankers Trust Company, New York City, on August 1, 1935.

[fol. 29] The source of my information and the grounds for my belief as to these facts are the records of said firm of Cravath, de Gersdorff, Swaine & Wood, which has had charge of all efforts to collect said judgment within the States of New York and New Jersey, and telegrams and correspondence from Herbert H. Salinger of the firm of Bacigalupi, Elkus & Salinger, attorneys, having their office at No. 485 California Street, San Francisco, California, who, I am informed and believe, have charge of all efforts to collect said judgment in California and who have supplied me with documentary evidence of the two sales of assets held on August 26, 1935, and have informed me that such sales were in all respects proper and in accordance with California law. I am further informed by officers of the plaintiff judgment-creditor Capital Company that said judgment-creditor has received no payments on account of said judgment other than the foregoing.

As a result of the foregoing, interest has accrued at the legal rate of 6% per annum on the amounts from time to time unpaid on account of said judgment as follows:

On $293,357.77 from July 18, 1935, to and including July 30, 1935	$578.68
On $281,820.81 from July 30, 1935, to and including August 1, 1935	92.65
On $281,343.47 from August 1, 1935, to and including August 26, 1935	1,154.15
On $227,096.97 from August 26, 1935,	4,069.08
Total interest to December 13, 1935	$5,894.56

It is submitted that the proper basis for fixing the amount [fol. 30] in which a judgment-debtor in contempt of court

is to be fined should be the amount then remaining unpaid on the judgment, plus the proper costs of the supplementary proceedings, since the amount of the fine apart from costs is to be applied toward the satisfaction of the judgment already properly found to be due and owing to the judgment-creditor and which in all probability would have been collected by the judgment-creditor through normal channels had not the wilful disobedience by the judgment-debtor and his evasions of the legal process of this Court (for a detailed statement of which see my affidavit in support of this motion sworn to November 18, 1935, pages 4 to 8 inclusive) prevented such collection. It is also proper in connection with the imposition of such fine (see Memorandum of Law submitted to the Court upon the settlement of this order) to award to the judgment-creditor the costs of the supplementary proceedings in which he has been guilty of such contempt, and the amount of such costs according to Section 803 of the New York Civil Practice Act (as added by L. 1935, Ch. 630, in effect September 1, 1935) may include the judgment-creditor's "witnesses' fees and other disbursements, including referees' fees," and "a sum in addition thereto not exceeding five per centum of the judgment." It is proper in allowing such costs to take into consideration a reasonable attorney's fee in connection with the supplementary proceedings (see Memorandum of Law submitted to the Court upon the settlement of this order) and it is submitted that in the circumstances of this case an award of costs to the extent of the full five per cent allowed by the New York Civil Practice Act is fully justified. The [fol. 31] following facts as to the services necessarily rendered by the judgment-debtor's attorneys in connection with these proceedings and as to the disbursements necessarily incurred in connection therewith are submitted in order that an adequate sum by way of costs may be allowed to recompense the judgment-creditor for the damage and loss resulting from the wilful contempt of the judgment-debtor of which he has herein been found guilty.

In connection with the supplementary proceedings in this case, a total of 247 professional hours have been necessarily expended by partners and associates of the firm of Cravath, de Gersdorff, Swaine & Wood, this matter having required a total of 147-1/4 professional hours of the time of four partners and four senior associates of said firm and 99-1/4

professional hours of the time of two junior associates of said firm. Said services have a reasonable value in excess of $5,000 and in addition to such services a substantial amount of stenographic time has been consumed in the preparation of affidavits, briefs and other necessary papers in connection with such supplementary proceedings. By reason of the evasion of the process of this Court by this judgment-debtor and his refusal to appear voluntarily for an examination as to his assets and his reliance upon every technicality afforded by the law in an attempt to avoid such an appearance even when served with process of this Court, it has been necessary for the judgment-creditor to employ detectives in order to apprehend this judgment-debtor and serve him with process when within the jurisdictional limits of this Court and the out-of-pocket disbursements for the [fol. 32] fees of such detectives and their necessary expenses necessarily incurred up to the present time amount to approximately $1,000. Substantial additional disbursements have been necessarily paid out for the fees and expenses of process servers in serving upon the judgment-debtor two subpœnas in supplementary proceedings, an order in supplementary proceedings and the order to show cause why he should not be punished for contempt of court upon which the present motion was granted. In the light of these facts, it is submitted that the full five per cent of the unpaid portion of the outstanding judgment which may according to law be allowed by the Court as costs in this proceeding should be allowed and should be directed to be paid to the judgment-creditor's attorneys in any event.

Samuel B. Stewart, Jr.

Sworn to before me this 5th day of December, 1935.
John F. Harding, Notary Public, Queens County.

[fol. 33] IN UNITED STATES DISTRICT COURT

In the Matter of William Fox, of Woodmere, Long Island, U. S. A., at Present Residing in the City of Toronto, Canada, and in the Matter of the Medical Condition of the Said William Fox

AFFIDAVIT OF FREDERICK G. BANTING

DOMINION OF CANADA,
Province of Ontario,
County of York, to wit:

I, Frederick Grant Banting, of the City of Toronto, in the County of York, Physician, do solemnly declare that

1. I am a duly licensed physician, having been admitted to practise in the dominion of Canada, in the month of December, 1916, I reside at Toronto, Canada, and my office is located at Banting Institute, in the said City of Toronto, in the said Province of Ontario.

2. I am well acquainted with the said William Fox and was consulted by him concerning his diabetic condition.

3. I am not engaged in routine medical practice and by reason of same I referred the said William Fox to my colleague, Dr. F. W. W. Hipwell, of the City of Toronto, Ontario.

4. Dr. Hipwell kept me posted as to his findings in the case of the said William Fox from day to day and I first saw Mr. Fox in consultation with Dr. Hipwell on the 23rd day of October, 1935, and further saw the said William Fox on two subsequent occasions during the following week.

5. I thoroughly investigated the medical reports of Mr. Fox's case, the medical history and upon further examination of Mr. Fox, I ascertained that he was suffering from diabetes, nervous exhaustion, low blood pressure and arthritis.

(a) The arthritis of Mr. Fox's particular case was very painful, but in an otherwise healthy man, would not be such an alarming sympton.

(b) His diabetes, in itself, was not alarming as it could be controlled by insulin.

(c) There was evidence of arteriosclerosis (which is usually associated with high blood pressure), and yet Mr. Fox's blood pressure was much below normal.

6. These findings, along with the man's general appearance and mental condition, were indicative of severe nerv- [fol. 34] ous exhaustion. The exhaustion, combined with his diabetes and general condition had reduced his vitality to the point where he was on the verge of a complete physical and mental breakdown.

7. On October the 23rd last I recommended that Mr. Fox should be placed on an adequate diet with insulin, but emphasized that he must have complete mental and physical relaxation for at least six months and further recommended having regard to his active life, that confinement to bed was not in the best interests of his progress, and therefore recommended that he have light exercise and mild mental diversion in that he be allowed to go for automobile drives or walks and occasionally go to places of amusement and entertainment.

8. Between October the 23rd and December the 13th last, respectively, Mr. Fox has improved slowly.

9. In my opinion it would be detrimental to Mr. Fox's present medical condition for him either to go to New York or be subjected to examination in Toronto as I feel that such an ordeal would put him back in the dangerous condition which I found him during the middle of October last.

And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of "The Canada Evidence Act."

F. G. Banting, M.B.

Declared before me at the City of Toronto, in the Province of Ontario this 16th day of December, A. D. 1935. Glenn A. Sullivan, A Notary Public in and for the Province of Ontario. (Seal of Glenn Alexander Sullivan, Notary Public, Ontario.)

O. K. J. A. C.

[fol. 35] In United States District Court, Southern District of New York.

[Title omitted]

Affidavit of G. Glen Stewart

State of New York,
County of New York,
Southern District of New York, ss:

G. Glen Stewart, being duly sworn, deposes and says:

I am an operative employed by Railway Audit & Inspection Co., Inc., and as such have been engaged since November 28, 1935, in observing and gathering information as to the movements and activities of William Fox, who during that period has been in Toronto, Canada. My observations have confirmed the following facts:

Mr. Fox has a room at the Toronto General Hospital and is there taking insulin treatments from Dr. F. W. W. Hipwell, of 160 Bloor Street, Toronto, Canada. Mr. Fox has not been confined to bed throughout this period, but frequently leaves the hospital and on such occasions is gone for several hours at a time during the day, returning to the hospital in the afternoon and staying there at night. It has, of course, been impossible for me to observe Mr. Fox constantly myself, but I have seen him outside of the hospital in the City of Toronto on two occasions since November 28, these two occasions being on Monday, December 2, [fol. 36] and again on Thursday, December 5, on both of which occasions I saw him returning, walking up to and into the entrance to the private patients' pavilion of the Toronto General Hospital, at about 3:15 o'clock in the afternoon. On both of these occasions he was unaccompanied by any other person. On both of these occasions Mr. Fox was walking at a normal gait and did not appear to be weak physically or in any other respect abnormal and on one of the occasions when I observed him he was smoking a cigar.

In addition to my personal observations, I have gathered information from various other people who have had an opportunity to observe Mr. Fox but whose affidavits can not be secured because of the fact that they would doubtless lose their positions if their identity should be disclosed.

One of these persons is in a position to directly observe the movements of Mr. Fox at the hospital and he has informed me, and I verily believe, that up to and including last Tuesday, December 10, Mr. Fox left the hospital practically every morning since he had been there at about 10 o'clock in the morning and stayed away for several hours, usually until shortly after three o'clock in the afternoon.

I have also been informed by an employee of E. A. Pierce & Co., whose office in Toronto is located at Bay and Wellington Streets, that Mr. Fox has been in the habit of coming regularly to their office during the hours when the New York Stock Exchange is open, ever since he has been in Toronto. On these occasions, I am informed and verily believe, he is usually accompanied by a Mr. Altman who has been variously described to me by persons in a position to know as a bodyguard, secretary and valet. This em- [fol. 37] ployee of E. A. Pierce & Co. has informed me, and I verily believe, that during his visits to the office of E. A. Pierce & Co. Mr. Fox spends the major portion of his time sitting around the office watching prices of securities on the New York Stock Exchange as they are reported. This information is further corroborated by a clipping from the Toronto Star and another clipping from the Toronto Evening Telegram, both published December 3, 1935, and both of which are daily newspapers published in the City of Toronto. These clippings are annexed hereto and respectively marked Exhibits A and B.

I have also been informed that Mr. Altman is staying at the Toronto General Hospital while Mr. Fox is there, not for any treatment but purely in his capacity as an employee of Mr. Fox. In this connection there is attached hereto (marked Exhibit C) a clipping taken from the Toronto Star, a daily newspaper published in Toronto, on or about December 11, 1935, from which clipping it will be noted that a protest has been made by the Toronto Hotel Association, Inc. against the operation of the Toronto General Hospital, where Mr. Fox and Mr. Altman are staying, in competition with the Toronto hotels.

While I have been informed that Mr. Fox is always accompanied by Mr. Altman when he leaves the hospital in the morning, he has, as previously stated, been alone on

both occasions when I observed him returning to the hospital in the afternoon and on neither of those occasions did he appear to be in any need of any assistance whatsoever in getting about.

G. Glen Stewart.

Sworn to before me this 16th day of December, 1935.
John F. Harding, Notary Public, Queens County.

O. K. J. A. C.

Film Empire's Ex-Ruler Seeks Health in Toronto

WILLIAM FOX

William Fox, Once Feared Fiery Warrior, Seeks Diabetes Treatment Here

The man whom the entire film industry once feared, battle-scarred veteran of a hundred court cases, the man who attempted to monopolize all filmdom with his sound on film patents, William Fox, former head of Fox Films, is in Toronto, quietly seeking medical attention for diabetes.

The once fiery warrior, who bought a Brooklyn theatre in 1908 for $1,000 and sold out his film interests in 1930 for $18,000,000, is now a sick man, looking ten years older than his 56 years. He still preserves his one deep-rooted phobia—a rather violent aversion to being interviewed.

Hiding away in a private hospital room, his one diversion is his morning trip downtown to take a peek at the New York ticker tape. He is accompanied always by another man, a combination secretary, nurse and bodyguard. He lived up to his reputation of avoiding interviews.

"Are you a newspaper man?" That was his first question.

"Well, er—"

"No. Please." He shook his head vigorously. "I haven't anything to say. I never give out interviews. I'm a sick man." He drew a large muffler about his throat. His secretary helped him to put on his rubbers. "I'm just here for treatment, you know. I have diabetes."

AVOIDING THE SIXTH

During his lifetime he is said to have given out five interviews. He made every effort possible to avoid the sixth. A small man with a long crooked nose, a bald head, one crippled arm and one sightless eye, he is noted for his irascible temper. He takes little interest in national affairs, has no statement to make on the future of the film industry; doesn't care much, evidently, what it does.

His life and career have been tempestuous. Born in Tulchva, Hungary, in 1879, the son of Michael and Anna Fuchs, he came to the United States as an infant, and had rather an informal education in the New York public schools. He became theatrical manager of a Brooklyn theatre in 1904, later bought his own theatre, and laid the foundation of his vast empire of 1,800 theatres on both sides of the Atlantic and the big rambling Fox studios near Beverly Hills, California.

He bought the Roxy Theatre in New York in 1926, followed his wholesale theatre buying by purchasing the entire Loew Corporation in 1928, and in 1929 was recognized as virtually the leader of the film industry. He made money from quickly produced, inexpensive pictures, and such stars as Tom Mix, Theda Bara, William Farnum, Buck Jones.

"Les Miserables," "Salome," "Cleopatra," "The Queen of Sheba" and that old heart throbber, "Over the

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"Les Miserables," "Salome," "Cleopatra," "The Queen of Sheba" and that old heart throbber, "Over the Hill;" all rolled a golden stream into the box office and the pockets of William Fox. He assumed complete control of his corporation by the simple process of locking the majority of the stock in his own safe box.

CORPORATE TANGLE

With the first stock market tremors of 1929 his vast empire began to topple. When he sold his class "B" stock, $18,000,000 worth, to Harley Clark, of General Theatres, in 1930, he left behind him one of the knottiest and most famous corporate tangles in modern finance. Fox Films has since merged with Twentieth Century and passed into the hands of Joseph Schenck and 33-year-old Darryl Zanuck.

But Fox had not left motion pictures. He owned outright the patents on two gadgets necessary for the producing of sound on film. He attempted to extract royalties from the entire industry, the use of the two gadgets being important in the adopted method of sound production. And the lower courts upheld the validity of his claim. The case was dragged through court after court. In March of this year the Supreme Court reversed the decision and Fox lost his monopolistic hold on the film industry.

Sly, secretive, the next move of Fox is not known. At the present time he is content to live in his large English home on Long Island, with its own private theatre, and next to the Woodmere Golf Club. For that is his one hobby. He plays a game in the low eighties, and once made a hole in one. Of that he is probably far prouder than of any of his achievements in the film industry.

EXHIBIT "B" TO AFFIDAVIT

TORONTO STAR 11/5/32

VETERAN OF MOVIES WM. FOX IS IN CITY

Seeks Medical Advice in Treatment of Diabetes

Veteran of the movie business, William Fox, former head of Fox Films, is in Toronto seeking medical treatment for diabetes, it was learned to-day.

The man who bought a Brooklyn theatre for $1,000 in 1908 and after a spectacular rise sold his interests for $18,000,000 in 1930 leaves his room daily for a trip downtown to glance at the New York ticker tape. On these trips he is accompanied by another man, a combination bodyguard, nurse and secretary.

Said to have given but five interviews during his stormy career, Mr. Fox still declines to talk for publication. When a newspaper man approached him in Toronto Mr. Fox remarked: "I haven't anything to say. I never give interviews. I'm a sick man."

EXHIBIT "C" TO AFFIDAVIT

HOTELMEN PROTEST HOSPITAL COMPETES

Sell Rooms, Meals to Patients' Kin, Says Letter

The Toronto Hotel Association, Inc., to-day protested to board of control to-day against the Toronto General Hospital as being "in direct competition with the hotels in connection with the sale of rooms." The letter was sent on to the hospital board.

The letter read: "When a patient arrives at the hospital and some relative comes along with him, the first thought is to sell the relative the adjoining room and then food in their restaurant, which does not seem just fair because of the fact that the Toronto General hospital pay no taxes while members of the association are finding it difficult to pay their taxes."

The letter, over the signature of George Wright, also noted that the Restaurant Association was protesting against the hospital restaurant.

[fol. 40] RECITAL AS TO OPINION

[Endorsed on Order to Show Cause—See fol. 9, ante.]

[fol. 41] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Present: Hon. William Bondy, U. S. D. J.

Index No. L 59-192

In the Matter of Supplementary Proceedings of CAPITAL COMPANY, a California Corporation, Judgment-Creditor,

against

WILLIAM FOX, Judgment-Debtor

ORDER ADJUDGING JUDGMENT-DEBTOR IN CONTEMPT—Dec. 19, 1935

The judgment-creditor, Capital Company, having moved this Court by order to show cause dated November 1, 1935, for an order punishing the judgment-debtor, William Fox, for contempt of Court for his failure to appear in obedience to a subpœna directing him to testify and be examined under oath in supplementary proceedings, and for such other, further and different relief as to the Court may seem just and proper,

Now, on reading and filing the said order to show cause dated November 1, 1935, and the affidavits of Samuel B. Stewart, Jr., sworn to on November 1 and on November 18, 1935, respectively, the affidavit of Charles N. Fiddler sworn [fol. 42] to November 20, 1935, the subpœna issued herein on September 28, 1935, directing William Fox, the judgment-debtor, to appear before one of the Judges of this Court at Room 235, United States Court Rooms and Old Post Office Building in the Borough of Manhattan, City of New York, on October 15, 1935, at 10:30 a. m. to testify and be examined under oath in supplementary proceedings concerning his property, income, rights and credits, any and all of his assets or other means of satisfying the judgment recovered by the judgment-creditor in this Court on July 18, 1935, against said judgment-debtor, the affidavit of J. Morman sworn to the 11th day of October, 1935, showing due service of said subpœna, the affidavit of Charles

N. Fiddler sworn to November 12, 1935, showing the service of said order to show cause and the affidavit upon which the same was based, the notation of such judgment-debtor's default dated October 15, 1935, all in support of said motion, the affidavit of Daniel G. Rosenblatt, sworn to November 20, 1935, in opposition to said motion, and the supplemental affidavit of Samuel B. Stewart, Jr., sworn to the 5th day of December, 1935, showing that no part of the judgment entered in favor of said judgment-creditor against said judgment-debtor on July 18, 1935, in the amount of $297,412.91 has been paid, except that there has been credited and realized on account thereof the sum of $70,315.94, leaving a balance due in the sum of $227,096.97 with interest at the rate of 6% per annum on $293,357.77 from July 18, 1935, to and including July 30, 1935, on $281,820.81 from July 30, 1935, to and including August 1, 1935, on $281,343.47 from August 1, 1935, to and including August 26, 1935, and on $227,096.97 from August 26, 1935, making a net balance now due and unpaid of $233,215.52, [fol. 43] and said motion having come on regularly to be heard on the 19th day of November, 1935; and after hearing Messrs. Cravath, de Gersdorff, Swaine & Wood (Samuel B. Stewart, Jr., of counsel), attorneys for the judgment-creditor, in support of said motion, and Messrs. Hirsh, Newman, Reass & Becker (Daniel G. Rosenblatt, of counsel) appearing specially for said judgment-debtor for the purpose of contesting the validity of the service of said subpœna and the validity of the service of the papers on the motion to punish said judgment-debtor for contempt, and after due deliberation thereon, the Court having filed a written opinion on December 3, 1935, granting said motion, and the Court having held in abeyance the settlement and entry of an order upon said motion pending the submission of further proof respecting the physical condition of the judgment-debtor, and such further proof having been submitted to the Court on December 17, 1935, in the affidavits of Dr. Frederick Grant Banting and G. Glen Stewart, both sworn to on the 16th day of December, 1935,

Now, upon all of the foregoing papers and on motion of Messrs. Cravath, de Gersdorff, Swaine & Wood, attorneys for said judgment-creditor, it is

Ordered that said motion to punish said judgment-debtor for contempt be and hereby is granted, and it is

Ordered and Adjudged that William Fox, the judgment-debtor herein is hereby found guilty of contempt of Court in having disobeyed said subpœna in supplementary proceedings dated September 28, 1935, by his failure to appear for examination in supplementary proceedings on October 15, 1935, as required by said subpœna; that said judgment-[fol. 44] debtor has failed satisfactorily to excuse or explain said contempt; that said misconduct on the part of said judgment-debtor was wilful and was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment-creditor herein; and it is further

Ordered that said judgment-debtor shall have leave to purge himself of this contempt by (1) appearing on the 6th day of January, 1936, at 10:30 a. m. and from day to day thereafter as may be necessary, at the Toronto General Hospital in Toronto, Canada, or at such other time and place, in lieu of appearance before this Court as directed by the aforesaid subpœna of this Court, dated September 28, 1935, as may be agreed upon by Messrs. Cravath, de Gersdorff, Swaine & Wood, attorneys for the judgment-creditor, and by Messrs. Hirsh, Newman, Reass & Becker, attorneys for the judgment-debtor, to testify and be examined under oath concerning his property, income, rights and credits, any and all of his assets or other means for satisfying the said judgment; and (2) producing for examination by the judgment-creditor and its attorneys at such time and place such books, records and papers of the judgment-debtor as shall be material and necessary on such examination; and (3) paying any and all costs and disbursements which may hereafter be awarded to the judgment-creditor or its attorneys in connection with this proceeding; and it is further

Ordered that any Notary Public or other officer authorized and qualified for such purpose, at the place where the examination is held, may administer the oath to the judgment-debtor at such examination with the same force and effect as if the examination were held in the court room [fol. 45] and the oath duly administered by a judge of this Court, and may with like force and effect witness the signature of the stenographer's minutes of the testimony taken; that the transcript of the testimony, after execution by the judgment-debtor, shall be sent to the attorneys for the

judgment-creditor and that the fee of the person administering the oath and stenographer's fees in connection with the taking of said testimony shall be paid by the judgment-debtor at the time of the signing and execution of said testimony; and it is further

Ordered that the punishment, costs and disbursements, if any, to be imposed upon said judgment-debtor for his contempt herein are left open subject to being fixed by supplemental order of the Court to be entered herein upon application made upon two days' notice by counsel for the judgment-creditor to Messrs. Hirsh, Newman, Reass & Becker, of 100 Broadway, New York City, as attorneys for the judgment-debtor, at any time after January 6, 1936; and it is further

Ordered that service of a copy of this order upon Messrs. Hirsh, Newman, Reass & Becker, attorneys appearing specially for said judgment-debtor, on or before December 21st, 1935, shall be deemed sufficient service thereof for all purposes.

Wm. Bondy, U. S. D. J.

Notice of settlement of the foregoing order is hereby waived.

December 19, 1935.

Hirsh, Newman, Reass & Becker, Attorneys for Judgment-Debtor, Appearing Specially.

[fol. 46] In United States District Court, Southern District of New York

[Title omitted]

Petition for Appeal

To the Honorable Judges of the District Court of the United States of the Southern District of New York:

The Petitioner, William Fox, appearing specially herein, by his attorneys, Hirsh, Newman, Reass & Becker, feeling aggrieved by the final order made on December 19, 1935 by this Court and filed therein on December 20, 1935, which grants the motion to punish the judgment-debtor as and for a civil contempt, does hereby appeal from the said or-

ders of this Court to the United States Circuit Court of Appeals for the Second Circuit, on the ground that certain errors, more fully set forth in the assignment of errors, were committed to the prejudice of this petitioner, and that a transcript of the record of proceedings and papers upon which the said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Second Circuit.

Wherefore, this petitioner prays for an appeal from said orders to the United States Circuit Court of Appeals for the Second Circuit, that the same shall operate as a supersedeas of the order given in the District Court, for the re- [fol. 47] versal of the errors so complained of, for allowance of said appeal, for leave to prosecute the same, and the reversal of said order.

Dated New York, December 21, 1935.

Hirsh, Newman, Reass & Becker, Attorneys Appearing Specially Herein for Petitioner, William Fox, Judgment-Debtor, Appellant, 100 Broadway, New York City.

O. K. J. A. C.

[fol. 48] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the petitioner, William Fox, appearing specially herein, by his attorneys, Hirsh, Newman, Reass and Becker, and files the following assignment of errors and says that the orders made in this cause on December 19, 1935, and filed December 20, 1935 is erroneous and unjust for the following reasons:

1. The Court erred in granting the motion of the judgment-creditor (respondent) to punish the judgment-debtor as and for a civil contempt of this Court.

2. The Court erred in failing to deny the said motion to punish the judgment-debtor as and for a civil contempt of this Court.

3. The Court erred in refusing to find that process to commence an action or special proceeding must be served on the defendant or judgment debtor, as the case may be, within the territorial limits of the United States District Court for the Southern District of New York.

[fol. 49] 4. The Court erred in refusing to find that the subpœna in supplementary proceedings constitutes the process which commences that special and independent proceeding known as "Supplementary Proceedings."

5. The Court erred in refusing to find that failure to obey a void process does not constitute civil contempt of court.

6. The Court erred in refusing to find that Section 28 of the U. S. Code Ann. 654, providing for the service of a subpœna within one hundred (100) miles from the courthouse, refers only to witnesses in a proceeding which is pending and which was validly instituted and cannot be the basis of instituting an action or special proceeding, and in refusing to find that the said Section 28 of the U. S. Code Ann. 654, is not applicable to the instant proceeding.

Wherefore, petitioner William Fox, prays that the orders made on December 19, 1935, and filed December 20, 1935, by the United States District Court for the Southern District of New York, be reversed and that the said District Court be directed to enter an order denying the said motion to punish the said judgment debtor as and for a civil contempt of this Court.

Dated New York, December 21, 1935.

Hirsh, Newman, Reass & Becker, Attorneys, Appearing Specially Herein for Petitioner, Judgment-Debtor, Appellant, 100 Broadway, Borough of Manhattan, City of New York.

O. K. J. A. C.

[fol. 50] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL WITH SUPERSEDEAS

This 21st day of December, 1935, comes the judgment debtor, appearing specially herein by his attorneys, and files herein and presents to the Court a Petition for allowance of an appeal and assignment of errors intended to be argued by him, and praying also that a transcript of the record and proceedings and papers upon which the order herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the Court does hereby allow the appeal and orders that the same shall operate as a supersedeas of the order made in the District Court on December 19, 1935, and filed December 20, 1935, and that a transcript of the record, proceedings and papers in this case, duly authenticated, shall be sent to the Circuit Court of Appeals for the Second Circuit.

On further consideration, the Court does hereby stay the judgment-creditor, its agents and attorneys from taking [fol. 51] any and all proceedings of any kind or nature pursuant to the order obtained in the District Court on December 19, 1935, and filed December 20, 1935, until the hearing determination of the Circuit Court of Appeals for the Second Circuit, and service of an order thereon with notice of entry.

Dated New York, December 21st, 1935.

Martin T. Manton, U. S. D. J.

A true copy. Charles Weiser, Clerk. (Seal District Court of the United States, Southern District of N. Y.)

[fol. 51½] [Endorsed:] Copy received December 23, 1935, Cravath De Gersdorff, Swaine & Wood, Attorneys for Judgt-Cr. e/H/12/23/35.

[fol. 52] Bond on appeal for $250.00, approved Dec. 21, 1935, omitted in printing.

[fol. 53] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF SAMUEL B. STEWART, JR.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Samuel B. Stewart, Jr., being duly sworn, deposes and says:

I am an attorney and counsellor-at-law associated with the firm of Cravath, de Gersdorff, Swaine & Wood, attorneys for the judgment-creditor herein, and I am familiar with the facts herein. This affidavit is submitted in connection with the settlement of the order of this Court herein fixing the punishment to be imposed upon the judgment-debtor William Fox for his contempt of court heretofore adjudged by order of this Court dated December 19, 1935, and its purpose is to present certain facts bearing upon the amount of the fine which should be properly fixed as the penalty for such contempt of court.

The effect of said contempt of court has been seriously to defeat, impair, impede and prejudice the rights and reme-[fol. 54] dies of the judgment-creditor herein in the collection of the judgment in the sum of $297,412.91 entered in its favor by this Court on July 18, 1935, upon a confession of judgment theretofore executed by this judgment-debtor. I am informed and verily believe that no part of said judgment has been paid except that there has been credited and realized on account thereof the sum of $70,315.94, which sum includes:

$604.64 paid on account of rent on May 8, 1935;
11.92 interest thereon from May 8, 1935, to and including July 18, 1935, date of entry of judgment;

2,491.03 premium on Owners' Landlords and Tenants Insurance Policy;

53.51 interest thereon from March 29, 1935 to and including July 18, 1935;

9.00 adjustment of interest on taxes;

881.99 personal property taxes paid;

3.05 interest thereon from July 1, 1935, to and including July 18, 1935;

49,246.50 proceeds of sale on August 26, 1935, of chattels pledged as security for defendant's obligations;

5,000.00 proceeds of sale on August 26, 1935, of stock pledged as security for defendant's obligations;

11,536.96 paid by United States Fidelity and Guaranty Company, of Maryland, on July 30, 1935;

477.34 collected under execution levied against bank account maintained by defendant in Bankers Trust Company, New York City, on August 1, 1935.

The source of my information and the grounds for my belief as to these facts are the records of said firm of Cravath, de Gersdorff, Swaine & Wood, which has had charge of all ef- [fol. 55] forts to collect said judgment within the States of New York and New Jersey, and telegrams and correspondence from Herbert H. Salinger of the firm of Bacigalupi, Elkus & Salinger, attorneys, having their office at No. 485 California Street, San Francisco, California, who, I am informed and believe, have charge of all efforts to collect said judgment in California and who have supplied me with documentary evidence of the two sales of assets held on August 26, 1935, and have informed me that such sales were in all respects proper and in accordance with California law. I am further informed by officers of the plaintiff judgment-creditor Capital Company that said judgment-creditor has received no payments on account of said judgment other than the foregoing.

There is, therefore, due and unpaid on said judgment the sum of $227,096.97, plus interest, which, as a result of the foregoing, has accrued at the legal rate of 6% per annum on the amounts from time to time unpaid on account of said judgment as follows:

On $293,357.77 from July 18, 1935 to and including July 30, 1935	$578.68
On $281,820.81 from July 30, 1935 to and including August 1, 1935	$92.65
On $281,343.47 from August 1, 1935 to and including August 26, 1935	$1,154.15
On $227,096.97 from August 26, 1935, to and including January 30, 1936	$6,159.58
Total interest to and including February 7, 1936	$7,985.06
Unpaid balance of judgment	$227,096.97
Balance due and unpaid on judgment, including interest to Feb. 7, 1936	$235,082.03

Interest will continue to accrue thereon at the rate of $37.33 per day until paid.

Since the amount of the fine to be fixed herein is in the discretion of the Court, the following recital of pertinent facts bearing upon the past history of this litigation is set forth as a consolidation of the recitals incorporated in pre-
[fol. 56] vious affidavits presented to the Court and of facts which have occurred since the submission of those affidavits.

The judgment, pursuant to which these proceedings supplementary to judgment have been commenced, is based upon an indebtedness for rent upon a theatre in San Francisco, California, payment of which rent was guaranteed in writing by this judgment-debtor. After numerous demands over a period of months had failed to produce any satisfactory arrangement for the payment of this obligation, your deponent was instructed by the judgment-creditor to commence action against this judgment-debtor to recover the sums due. Although this judgment-debtor was conceded to be domiciled in this State and to have a place of residence in the Borough of Manhattan, City of New York, in this District, and another place of residence in the County of Nassau in the Eastern District of New York, and although his present attorneys, Messrs. Hirsh, Newman, Reass & Becker, were informed by your deponent of the desire to serve Mr. Fox and although three process servers including one Deputy United States Marshal made numerous efforts

to effect service upon him, it was only after such efforts had been continued for a period of approximately two months and after a proposed order for substituted service had been prepared for signature by the Court and the judgment-debtor's attorneys informed of this fact that they consented to put in an appearance for him in the action.

Then after the service of the complaint Mr. Fox's attorneys asked for all the time to answer that your deponent would give them. Shortly after receiving an answer on [fol. 57] behalf of Mr. Fox, your deponent made a motion for summary judgment in the District Court which was adjourned for a long period of time pending negotiations between Mr. Fox and the judgment-creditor and which was ultimately withdrawn upon the execution by Mr. Fox of a confession of judgment for the full amount of the claim. This confession of judgment was executed by Mr. Fox on May 3, 1935, in connection with a stipulation between the attorneys that judgment should not be entered prior to July 13, 1935, which stipulation was granted by your deponent upon the assurances of the judgment-debtor and his attorneys that efforts were being made to work out a reorganization of the judgment-debtor's affairs which would make possible a payment of the judgment in full by July 13, 1935.

A few days prior to July 13, 1935, an officer of the judgment-creditor communicated with your deponent stating that Mr. Fox had been in direct communication with certain other officers of the judgment-creditor in California attempting to arrange a further delay of the judgment day. Your deponent was informed and believes that such negotiations fell through, however, and consequently your deponent's firm was instructed to enter the judgment which was done on July 18, 1935, after an application by the judgment-debtor's attorneys to stay the entry of this judgment had been refused by Judge Bondy of the District Court.

Your deponent is further informed and believes that on July 17, 1935, the judgment-debtor was testifying in an examination before trial in another action and that such examination was taking place in Mineola, Long Island, in [fol. 58] the Eastern District of New York and well within 100 miles of this Court House; that substantially coincident with the entry of this judgment, however, that examination was adjourned to the Hotel Claridge in Atlantic City, New

Jersey. It was during the course of one of the hearings on this examination at the Hotel Claridge, as your deponent is informed and believes, that service upon Mr. Fox of a subpœna was first effected. That subpœna was ultimately set aside by Judge Patterson of the District Court because served more than 100 miles from the Court House.

Following the decision by Judge Patterson, a new subpœna in supplementary proceedings was issued by the District Court on September 28, 1935, directing the judgment-debtor to appear in the District Court for examination on Tuesday, October 15, 1935. This subpœna was served upon the judgment-debtor on a railroad train entering the City of Philadelphia at a point which was 82.6 miles from Pennsylvania Station, New York City, and well within 100 miles of this Court House, on October 8, 1935, seven days before the return day of said subpœna. Although this service complied in all particulars with the requirements prescribed by Judge Patterson in his decision setting aside the previous service, the judgment-debtor neither appeared nor moved to set aside such subpœna, but failed to answer when his name was called in open court on the return day of the subpœna, at which time your deponent was present and prepared to examine him. His default was duly noted.

The judgment-debtor has persistently refused to appear at any time or place for the purpose of giving testimony respecting his assets and has resorted to every known technicality to avoid the necessity of such appearance. Indeed, [fol. 59] after the District Court handed down its opinion stating that the judgment-debtor was guilty of contempt of court and before any order had been entered thereon, Judge Bondy held two conferences with counsel for both sides at which he received reports from two different doctors as to the physical condition of the judgment-debtor with respect to his ability to appear for examination, and at those conferences your deponent voluntarily offered to go to Toronto, Canada, where the judgment-debtor then was, to examine him in order to save him the small trouble involved in a trip to New York City. Judge Bondy stated that he regarded the doctors' reports as extremely weak evidence of inability to appear for examination, but upon an appeal by Mr. Daniel G. Rosenblatt, of counsel for the appellant, that the appellant be allowed to enjoy the Christmas season with-

out worry about an examination which might have a bad effect upon his health, and upon the definite assurance of Mr. Rosenblatt that he would produce Mr. Fox for examination either in Toronto or at some other mutually agreeable place after the first of the year, Judge Bondy signed the order providing that the appellant might be purged of his contempt by such an appearance for examination, and reserved decision as to the nature and extent of his punishment in the event that he should fail so to purge himself, so that no order has been entered up to the present time fixing such punishment or fixing the costs to be awarded to the judgment-creditor in that connection.

In spite of the assurance that Mr. Fox would be produced pursuant to the most generous leave granted by the Court to enable him to purge himself of contempt of court, [fol. 60] his attorneys on the very next day after the entry of the order granting him such leave (December 21, 1935) served upon the attorneys for the judgment-creditor a petition for appeal and order allowing an appeal with supersedeas and fixing the return of the citation for March 2, 1936 (contrary to the requirement of Rule XIII, subd. 6, of the rules of the Circuit Court of Appeals, Second Circuit, that "all citations must be made returnable not exceeding 30 days from the day of signing the citation"). Counsel for the judgment-creditor, believing it to be beyond the jurisdiction of the Circuit Court of Appeals to hear an appeal from an order holding a judgment-debtor guilty of contempt of court during the pendency of a supplementary proceeding and prior to the termination of that proceeding, made a motion at the next motion day of the Circuit Court of Appeals (January 6, 1936) to dismiss such appeal. Said motion was unanimously granted by the Circuit Court of Appeals and the supersedeas was accordingly vacated. A true and accurate copy of the order entered thereon by the Circuit Court of Appeals is annexed hereto, marked Exhibit A.

A copy of said order was served upon the attorneys for the judgment-debtor on January 21, 1936, and I immediately communicated with Mr. Daniel G. Rosenblatt, a member of said firm of attorneys, by telephone, asking Mr. Rosenblatt if he would be willing in view of the decision of the Circuit Court of Appeals to produce Mr. Fox for examination either in New York or in Atlantic City, New Jersey (to which

place I am informed and believe he has traveled from Toronto, Canada, since the signing by this Court of the order of December 19, 1935) and Mr. Rosenblatt, in accordance [fol. 61] with the custom which he has almost uniformly followed in every proceeding in this litigation, requested time to consider the proposition and later telephoned me to say that his client (the judgment-debtor) had requested him and his partner, Mr. Becker, to come to Atlantic City to see him (the judgment-debtor) about the matter and that they would be unable to go until the following Saturday, January 25, 1936. Mr. Rosenblatt for that reason asked me if I would withhold submission of the annexed order fixing the judgment-debtor's punishment until he had had an opportunity to go to Atlantic City to confer with the judgment-debtor. I consented to give him this additional week of delay and again, in accordance with the custom which he has almost uniformly followed in connection with this litigation, he called me on Monday, January 27, 1935, at the expiration of this additional week of grace and informed me that his client (the judgment-debtor) felt very much aggrieved at the decision of this Court and at the decision of the United States Circuit Court of Appeals dismissing the appeal from the order of this Court, that his client, the judgment-debtor, would neither appear nor produce his records and that he (Mr. Rosenblatt) was instructed by his client (the judgment-debtor) to fight these proceedings to the last ditch.

The foregoing facts make clear and irresistible the conclusion that this judgment-debtor has defied this court to do its worst and has challenged it to attempt to enforce its orders.

In these circumstances it is submitted that the proper basis for fixing the amount in which a judgment-debtor in contempt of court is to be fined should be the amount then remaining unpaid on the judgment, plus the proper costs [fol. 62] of the supplementary proceedings, since the amount of the fine apart from costs is to be applied toward the satisfaction of the judgment already properly found to be due and owing to the judgment-creditor and which in all probability would have been collected by the judgment-creditor through normal channels had not the wilful disobedience by the judgment-debtor and his evasions of the legal process of this Court prevented such collection. It is also proper in connection with the imposition of such fine

(see Memorandum of Law submitted to the Court upon the settlement of this order) to award to the judgment-creditor the costs of the supplementary proceedings in which he has been guilty of such contempt, and the amount of such costs according to Section 803 of the New York Civil Practice Act (as added by L. 1935, Ch. 630, in effect September 1, 1935) may include the judgment-creditor's "witnesses' fees and other disbursements, including referees' fees," and "a sum in addition thereto not exceeding five per centum of the judgment." It is proper in allowing such costs to take into consideration a reasonable attorney's fee in connection with the supplementary proceedings (see Memorandum of Law submitted to the Court upon the settlement of this order) and it is submitted that in the circumstances of this case an award of costs to the extent of the full five per cent allowed by the New York Civil Practice Act is fully justified. The following facts as to the services necessarily rendered by the judgment-debtor's attorneys in connection with these proceedings and as to the disbursements necessarily incurred in connection therewith are submitted in order that an adequate sum by way of costs may be allowed to recompense the judgment-creditor for the damage and loss resulting from the wilful contempt of the judgment-debtor of which he has herein been found guilty.

[fol. 63] In connection with the supplementary proceedings in this case a total of 575 professional hours have been necessarily expended by partners and associates of the firm of Cravath, de Gersdorff, Swaine & Wood, such supplementary proceedings having required a total of 349¾ professional hours of the time of four partners and four senior associates of said firm and 225¼ professional hours of the time of three junior associates of said firm as well as a substantial amount of time of clerks employed by said firm and 356¾ hours of stenographic time. Said services have consisted of the following work strictly related to efforts to collect the judgment entered herein through supplementary proceedings in this action:

Conferences and correspondence with clients regarding steps to be taken to collect judgment.

Extensive conferences and correspondence in connection with pursuing investigation of facts as to the assets of the judgment-debtor and as to the disposition by him of the sum of $15,000,000 known to have been paid to him for his interest in the Fox Film Corporation in the year 1930.

Appearing in Judge Bondy's chambers at his request in opposition to application by judgment-debtor for a stay of execution on the judgment.

Preparing and securing issuance by Clerk of the Court and attending to service of numerous subpœnas in supplementary proceedings upon banks and trust companies throughout New York City and the metropolitan area. Extensive conferences, telephone conversations and correspondence with officers and employees of such banks.

Conferences with other creditors of the judgment-debtor [fol. 64] respecting information acquired by them concerning his assets.

Conference with the attorney for United States Fidelity & Guaranty Company of Maryland, the surety upon a part of the claim covered by the judgment; respecting payment of such part of the judgment.

Studying agreements, chattel mortgage, etc., between the parties and examining law respecting possible effect upon the judgment-creditor's rights of possible cancellation of lease upon which judgment based and of sale on foreclosure of stock held by the judgment-creditor.

Examining law as to the right in supplementary proceedings to take a deposition de bene esse of the judgment-debtor respecting his assets.

Examining law and investigating facts bearing upon right to serve subpœna and order in supplementary proceedings upon the judgment-debtor in Atlantic City, New Jersey; preparing and securing issuance by the court of subpœna and order in supplementary proceedings addressed to the judgment-debtor; traveling to Atlantic City, New Jersey and there effecting service upon the judgment-debtor at Hotel Claridge; telephone conversations with judgment-debtor's attorneys in Atlantic City and in New York City regarding production of the judgment-debtor for examination pursuant to the subpœna and order so served.

Studying the original papers served by attorneys for the judgment-debtor in support of motion to vacate said subpœna and order; preparing affidavit and memorandum of law for the Court in opposition to such motion; presenting argument in opposition to such motion before Judge Patterson in the District Court; studying reply affidavit [fol. 65] and memorandum of law submitted by attorneys

for the judgment-debtor and preparing reply memorandum on behalf of the judgment-creditor for submission to Judge Patterson.

Examining law as to right to appeal to the Circuit Court of Appeals from Judge Patterson's decision vacating subpœna and order served in Atlantic City, New Jersey.

Investigating facts respecting personal holding companies owned or controlled by the judgment-debtor and his wife.

Conferences with various detective agencies respecting arrangements for acquiring information as to the whereabouts, financial activities and assets of the judgment-debtor.

Preparing and securing issuance by the District Court of a new subpoena in supplementary proceedings addressed to the judgment-debtor; conferences with detectives in advance of service regarding manner and place of proposed service, and subsequent to service regarding affidavit as to the manner of service effected in Frankford Junction, Pennsylvania.

Examining law as to the validity of subpœnas served at Frankford Junction and telephone conversations with the judgment-debtor's attorneys regarding that question.

Studying financial data in preparation for examination of the judgment-debtor pursuant to the subpoena served upon him in Frankford Junction, and appearing in Federal court before Judge Goddard for the purpose of conducting such examination; attending to the notation of the judgment-debtor's default in appearing.

Examining law respecting punishment of the judgment-[fol. 66] debtor for civil contempt of court in disregarding the subpœna in supplementary proceedings served upon him at Frankford Junction, Pennsylvania.

Examining law respecting other possible legal methods of compelling appearance of the judgment-debtor for examination respecting his assets.

Preparing order to show cause why the judgment-debtor should not be punished for contempt of Court in disregarding the subpœna served upon him at Frankford Junction and preparing supporting affidavit; securing signature of such order to show cause by the Court; telephone conversations with various persons in New York City, Atlantic City and Toronto, Canada, regarding the whereabouts of the

judgment-debtor for the purpose of serving the order to show cause upon him; traveling to Atlantic City, New Jersey, and there effecting personal service of the order to show cause upon the judgment debtor; telephone conversations with the judgment-debtor's attorneys regarding the motion to punish him for contempt of Court; preparing and revising memorandum of law for the Court and supplemental affidavit in support of such motion; appearing in the District Court in connection with an application by the judgment-debtor's attorneys for an adjournment of the motion to punish him for contempt of Court; appearing again in the District Court before Judge Bondy and presenting argument in support of motion to punish judgment-debtor for contempt of Court; preparing supplemental memorandum of law for the Court on the ancillary character of supplementary proceedings and examining law in connection therewith; studying supplementary. material submitted to the Court by the judgment-debtor's attorneys in opposition to the motion to punish for contempt, examin- [fol. 67] ing law in connection therewith, and preparing three letters to the Court in reply thereto.

Numerous conferences with detectives, process servers and others in connection with efforts to serve process in supplementary proceedings upon the judgment-debtor enroute through the Southern District of New York between Atlantic City, New Jersey and Toronto, Canada.

Examining law regarding possible institution of a creditor's bill in equity in aid of the judgment entered and other available proceedings to reach assets transferred by the judgment-debtor to his wife and other members of his family.

Examining law as to the proper form of and provisions to be included in the order adjudging the judgment-debtor guilty of contempt of court; drafting and revising proposed order and affidavit in support thereof; preparing memorandum of law for the Court in connection with settlement of the order adjudging the judgment-debtor guilty of contempt of Court; studying papers submitted by the judgment-debtor's attorneys in opposition to the proposed order adjudging him guilty of contempt of Court and preparing reply for submission to the Court.

Preparing and securing issuance by the Court of witness subpœnas and third-party subpœnas in supplementary pro-

ceedings addressed to the judgment-debtor's wife and two daughters.

Two conferences in Judge Bondy's chambers at his request in connection with settlement of order adjudging judgment-debtor guilty of contempt of Court; preparing questions to be submitted to Sir Frederick Banting of Toronto, Canada, regarding the judgment-debtor's physical [fol. 68] condition; conferences with detectives regarding activities of the judgment-debtor in Toronto, Canada, and regarding affidavit to be submitted by them to Judge Bondy respecting such activities.

Checking real estate titles in New York City for evidences of property now owned or heretofore owned and transferred by the judgment-debtor.

Revising form of order adjudging judgment-debtor guilty of contempt of Court in accordance with Judge Bondy's suggestions and attending to submission thereof to the Court for signature.

Checking information received respecting sale at auction of assets of judgment-debtor pledged with his wife's personal holding company as security for an alleged loan.

Examining law as to nature and effect of proposed criminal contempt proceedings against the judgment-debtor.

Studying papers (including petition for leave to appeal, order allowing the appeal and staying further proceedings, citation on appeal and other related papers) served by the judgment-debtor's attorneys in connection with an appeal by them to the Circuit Court of Appeals from the order of Judge Bondy adjudging the judgment-debtor guilty of contempt; examining law as to the jurisdiction of the Circuit Court of Appeals in such cases and as to the probable success of a motion to dismiss the appeal; preparing and revising notice of motion to dismiss the appeal and to vacate the supersedeas and affidavit in support thereof; attending to service and filing of motion papers; preparing brief for Circuit Court of Appeals in support of motion to dismiss; presenting argument in support of motion in Circuit Court of Appeals.

Conferences with detectives respecting visit of the judg- [fol. 69] ment-debtor and his wife to New York City and service of witness and third-party subpœnas upon the wife of the judgment-debtor while here; examining law regarding validity of service of such subpœnas on Sunday; study-

ing papers served by attorneys for the judgment-debtor in support of their motion to vacate the subpœna served upon the wife of the judgment-debtor in this district upon the ground that the same was served upon Sunday; preparing and securing execution of affidavits in opposition to such motion and preparing memorandum of law for the Court upholding the validity of such service; presenting argument in opposition to motion to vacate subpœnas served on Mrs. Fox on Sunday before Judge Bondy in the District Court; revising memorandum of law for the court in accordance with Judge Bondy's suggestions at the argument.

Telephone conversations with attorneys for the judgment-debtor respecting dismissal of appeal from order adjudging the judgment-debtor guilty of contempt of Court and respecting question whether they would produce the judgment-debtor for examination; preparing proposed form of order fixing the judgment-debtor's punishment for contempt of Court, together with affidavit in support thereof for submission to Judge Bondy.

The work above listed has a fair and reasonable value of $7,000 for the 349¾ hours spent by four partners and four senior associates of the firm of Cravath, de Gersdorff, Swaine & Wood and a fair and reasonable value of $675 for the 225¼ hours spent by three junior associates of said firm. The 356¾ hours of stenographic time actually cost the sum of $570.80. Therefore, disregarding the time of clerks performing incidental services, the total fair and [fol. 70] reasonable value of the professional services of the judgment-creditor's attorneys strictly in connection with the supplementary proceedings, plus the actual cost of stenographic work necessarily done in that connection, is the sum of $8,245.80.

In addition to such work performed by partners and employees of the firm of Cravath, de Gersdorff, Swaine & Wood, the elusive and evasive tactics employed by the judgment-debtor in his effort to escape examination in supplementary proceedings have made necessary substantial out-of-pocket disbursements for detective services and related purposes. A detailed statement of such out-of-pocket disbursements, together with the dates thereof and the purposes for which spent, including in such statement the sums already expended as well as those already incurred but not yet paid out, is annexed hereto and marked Exhibit B and

hereby made a part of this affidavit. Such disbursements are continuing to accrue in substantial sums and necessarily will continue to do so until the judgment herein is paid.

In addition to the work above listed which, as stated, has a fair and reasonable value of $8,245.80, and the disbursements above referred to which amount to $3,049.20, substantial services outside of the supplementary proceedings but designed also to accomplish the collection of the judgment herein have been necessary. Such services have required the expenditure of a total of 22½ hours of professional time of your deponent, a senior associate of said firm of Cravath, de Gersdorff, Swaine & Wood, and at least 50 professional hours of one junior associate of said firm and one associate who is a member of the New Jersey bar and who is attorney of record in connection with the prosecution of an action in the State of New Jersey upon the unpaid balance of the judgment herein. Such services have [fol. 71] consisted of traveling to Atlantic City, New Jersey, and arranging details of service of process upon the judgment-debtor in Atlantic City, New Jersey; preparing, serving and filing complaint; attending to securing bond for costs demanded by the judgment-debtor's New Jersey attorney; studying long demand for bill of particulars served by judgment-debtor's New Jersey attorney and conducting extensive correspondence with clients and with associate California counsel for the purpose of securing information required by demand for bill of particulars; analyzing documents involved and preparing and serving bill of particulars. Such services have a fair and reasonable value of $725..

In addition, efforts to collect the judgment have required the expenditure by your deponent of 4 professional hours and by one junior associate of said firm of 8¾ professional hours in connection with the institution of an action in the Supreme Court of the State of New York, Nassau County, against the judgment-debtor and his wife, to set aside as in fraud of creditors a transfer of real property in Nassau County, New York. Such services have consisted of preparing and revising the complaint and lis pendens, securing the verification thereof and attending to the filing of the lis pendens; conferences with process servers regarding efforts to effect personal service upon the judgment-debtor and his wife in this action; preparing affidavits regarding

such efforts for use in support of application for leave to make substituted service; preparing the form of order for substituted service and securing signature thereof by the Court; effecting substituted service of the complaint and conferences with the judgment-debtor's counsel resulting in the filing of a notice of appearance on behalf of both de-
[fols. 72-74] fendants in the action. Said services have a fair and reasonable value of $100.

To recapitulate, the fair and reasonable value of services and the disbursements paid out or incurred to date are:

Attorneys services in supplementary proceedings	$7,675.00
Stenographic cost	570.80
Attorneys services in New Jersey action on judgment	725.00
Attorneys services in Nassau County action to set aside transfer of real estate	100.00
Disbursements in connection with foregoing	3,049.20
	$12,120.00

In view of the foregoing facts, it is submitted that an allowance of costs in the maximum amount (5% of the unpaid balance of the judgment, which would amount to $11,754.10 in this case) allowed by statute, in addition to the fine in the full amount of the judgment, is small punishment indeed for the contempt of Court of which the judgment-debtor has been found guilty.

Samuel B. Stewart, Jr.

Sworn to before me this 3rd day of February, 1936.
John F. Harding, Notary Public, Queens County.
(Seal.)

[fol. 75] 2/1/36

EXHIBIT "B" TO AFFIDAVIT

CAPITAL COMPANY

v.

FOX

Disbursements from July 18, 1935 to January 31, 1936, inclusive

1935		
July 22.	United States District Court, Southern District of New York, fee for 2 Judgment transcripts..	1.30
	Certifying copy of Judgment.....	.65
July 22.	Marshal of Southern District of New York fee for execution.....	4.24
July 22.	County Clerk of Nassau County, New York, fee for filing transcript.....	.35
July 22.	County Clerk of New York County, fee for filing transcript.....	.60
July 22.	Notary fee on affidavit.....	.25
July 23.	Subpoena fee to a bank.....	.50
July 24.	Witness fees in serving four banks.....	2.00
July 24.	Witness fees for serving ten banks with subpoenas.....	5.00
July 25.	Witness fees in serving subpoenas on New Jersey banks.....	4.50
July 30.	United States District Court, Southern District of New York, fee for entry of Judgment v. U. S. Fidelity & Guaranty Co.....	5.10
July 31.	United States District Court, Southern District of New York, fee for certified copy of order..	.60
July 31.	Fee for serving subpoenas on thirteen banks, trust companies and brokerage houses.....	6.50
July 25.	Cost of mimeographing 50 copies list of bonds..	6.70
Aug. 15.	Commercial Agency fee for special report.....	10.00
Aug. 2.	Subpoena fees with subpoenas delivered to four banks and trust companies.....	2.00
Aug. 13.	Investigator, expenses and fees, investigation of Wm. Fox at Woodburgh, L. I. and Morristown, N. J., including check up on files at Court House at Mineola, L. I.....	25.00

[fol. 76]

1935		
Aug. 29.	Traveling expenses to Atlantic City, New Jersey, re investigation of service of sup-pro..	45.50
Sept. 16.	Traveling expenses to Atlantic City, New Jersey, in connection with institution of New Jersey action.....	20.50
Sept. 16.	Sheriff of Atlantic County, New Jersey, services and expenses.....	11.10
Sept. 17.	United States District Court, Southern District of New York, fee for exemplified copy of Judgment.....	1.15
Sept. 17.	United States District Court, Southern District of New York, fee for blank form Sub pro....	.06
Sept. 18.	Julius Blumberg, New York City. Cost for blank forms New Jersey Sub proc.....	.30
Sept. 20.	New Jersey Supreme Court, Trenton, N. J. fee for filing of first paper in action.....	4.00
Oct. 8.	Fidelity & Deposit Co. of Maryland, premium on bond.....	5.00
Nov. 25.	Baker, Voorhis & Co.—cost of copy of Levine Supp. Proceedings, pamphlet.....	.36

EXHIBIT "B" TO AFFIDAVIT—Continued.

1935			
Nov. 13.	Traveling expenses to Atlantic City, N. J. in connection with serving contempt order to show cause on Wm. Fox	11.00	
Dec. 2.	Railway Audit & Inspection Co. Inc. Detective services and disbursements	443.95	
Dec. 17.	County Clerk of Nassau County, L. I. fee for filing Lis Pendens and summons and complaint	2.00	
Dec. 21.	United States District Court, Southern District of New York, fee for certifying 2 copies of order	2.40	
Dec. 24.	Railway Audit & Inspection Co.—Detective services and disbursements	454.11	
1936			
Jan. 2.	Cyril Howell, services and traveling expenses to Woodmere, L. I. in affecting substituted service of summons on defendants in Nassau County action	16.00	
[fol. 77]			
1936			
Jan. 6.	Circuit Court of Appeals, Second Circuit, New York, fee for filing Note of Issue on motion to dismiss appeal	.25	
Jan. 31.	Circuit Court of Appeals, Second Circuit, New York, fee for filing papers and entering order	1.75	
Jan. 30.	Subpoena fee with subpoena delivery on Superintendent of Bank of New York State	2.50	
	Telephone tolls, telegrams, charges incidental to night work, carfares and postage	191.03	
			1,288.25
	Disbursements incurred between December 1, 1935 and January 31, 1936, But Not Yet Paid.		
	Railway Audit & Inspection Co. Inc. Detective services and disbursements from December 1, 1935 to December 31, 1935	1,133.95	
	Railway Audit & Inspection Co. Inc. Detective services and disbursements from January 1, 1936 to January 31, 1936	627.00	
			1,760.95
	Total disbursements expended and incurred from July 18, 1935 to January 31, 1936		$3,049.20

[fol. 78] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF WILLIAM FOX

STATE OF NEW JERSEY,
County of Atlantic, ss:

William Fox, being duly sworn, deposes and says:

I am the judgment debtor appearing specially herein by my attorneys, Hirsh, Newman, Reass & Becker.

A few weeks ago, I returned from the Toronto General Hospital to Atlantic City, New Jersey, and am there continuing the rest and hospital treatment, pursuant to the directions and instructions which I have received from Sir Frederick Banting and Dr. Lemuel Hipwell, under whose care I was at the Toronto General Hospital.

I have strictly followed their instructions. I am physically unable to proceed with any examination of any kind, at this time.

I hope that a few more months of rest and relaxation will permit me so to improve that I shall be able to proceed with this litigation.

I am further advised by my counsel that in their opinion, this Court never did acquire jurisdiction over me in supplementary proceedings and pursuant to my instructions, [fol. 79] they will continue to contest that jurisdiction to the extent that the law permits.

The Court has already been advised that it is my contention, which has been presented and which will be prosecuted in the Courts of the State of New Jersey, where this judgment creditor has commenced an action against me, that the judgment upon which this plaintiff is pressing for my examination has already been fully paid and that the plaintiff has received several hundred thousands of dollars over and above the amount of the judgment outstanding against me.

I respectfully request that this Court consider the statements which I have made in this affidavit to demonstrate to this Court that I do not seek to flout the order of this Court or to avoid any examination, nor am I attempting to prevent the judgment creditor from proceeding with such rights as it may legally have. I wish to impress upon the Court that I am acting in utmost good faith, and that my failure to submit to an examination is based only on my ill health and the advice that I have received from my attorneys.

Wherefore, I respectfully ask (1) that the application to punish me for contempt be denied, (2) that the examination be vacated; or (3) that the Court fix the examination for some time in the future, pending an appeal which I have instructed my attorneys to take and prosecute.

William Fox.

Sworn to before me this 28th day of January, 1936.
Kathleen Lang, Notary Public.

O. K. J. A. C.

[fol. 80] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF DANIEL G. ROSENBLATT

STATE OF NEW YORK,
County of New York, ss:

Daniel G. Rosenblatt, being duly sworn, deposes and says:

I am a member of the firm of Hirsh, Newman, Reass and Becker, attorneys appearing specially herein for the judgment debtor, William Fox.

This affidavit is interposed in opposition to the order submitted for signature to Hon. William Bondy, U. S. D. J., and in answer to the statements contained in the affidavit of Samuel B. Stewart, Jr., of counsel for the judgment creditor, the said affidavit being sworn to on February 3, 1936.

At page 7 of his affidavit, Mr. Stewart states that I gave definite assurances that I "would produce Mr. Fox for examination either in Toronto or at some other mutually agreeable place after the first of the year." I never gave such assurance, nor was I ever in any position to give such assurance.

I must personally object to the attack made upon me by counsel for the judgment creditor. The fact is that we always contended and still do contend that the service of [fol. 81] the subpœna in supplementary proceedings that was made near Philadelphia, Pennsylvania, was absolutely void, and we are anxious to have that legal proposition passed upon by an appellate court.

It is not the purpose or intent of the judgment debtor and it is certainly not my intent to defy this Court. It is inconceivable that counsel for the judgment creditor should feel aggrieved by the fact that we, on behalf of the judgment debtor, intend to have an appellate court adjudicate the legal questions involved.

Neither the judgment debtor nor ourselves on his behalf are making any attempt to challenge this Court and we submit that counsel for the judgment creditor grossly mis-

interprets the prosecution of an appeal from a determination of a Judge of the District Court.

In discussing the various acts that were performed by the partners, associates and employees of the judgment creditor in an attempt to collect the judgment herein, counsel for the judgment creditor has listed innumerable items of legal services performed and disbursements incurred, which at all times were wholly unnecessary and constituted the grossest abuse of legal process. The attempt to include the charge for service for the preparation and service of subpœnas and other papers, which the Court has decreed to be wholly void, is, of course, entirely unauthorized. Reference to the work performed in the action pending in the Supreme Court of the State of New Jersey is likewise irrelevant for there the contention in the answer served on behalf of the defendant William Fox is that the judgment has been paid.

[fol. 82] Payment by the judgment creditor, or incurring of expenses by the judgment creditor for various detective agencies in order to determine the daily activities of the judgment debtor, when those activities are wholly inconsequential and irrelevant to the question of service of process, likewise constitute unauthorized charges.

It is respectfully submitted that the order to be entered herein should exclude any costs to be awarded to the judgment creditor.

Daniel G. Rosenblatt.

Sworn to before me this 10th day of February, 1936.
Edward M. Brandriss, Notary Public, Bronx County.

O. K. J. A. C.

[fol. 83] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Present: Hon. William Bondy, U. S. D. J.

Index No. L-59-192

In the Matter of Supplementary Proceedings of CAPITAL COMPANY, a California Corporation, Judgment-Creditor,

against

WILLIAM FOX, Judgment-Debtor

ORDER AND JUDGMENT FOR CONTEMPT—Feb. 7, 1936

The judgment-creditor, Capital Company, having moved this Court by order to show cause dated November 1, 1935, for an order punishing the judgment-debtor William Fox for contempt of Court for his failure to appear in obedience to a subpœna dated September 28, 1935, directing him to testify and be examined under oath in supplementary proceedings, and for such other further and different relief as to the Court may seem just and proper; and

An order having been signed by this Court on December 19, 1935, and entered herein on December 20, 1935, granting said motion and finding, ordering and adjudging the judgment-debtor William Fox guilty of contempt of court [fol. 84] and that said judgment-debtor had failed satisfactorily to excuse or explain said contempt and that said misconduct on the part of said judgment-debtor was wilful and was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the judgment-creditor herein; and having ordered that said judgment-debtor should have leave to purge himself of said contempt by (1) appearing on the 6th day of January, 1936, at 10:30 A. M. and from day to day thereafter as might be necessary at the Toronto General Hospital in Toronto, Canada, where the judgment-debtor was at the time of the signing of the said order, or at such other time and place, in lieu of appearance before this Court, as might be agreed upon between the attorneys for the respective parties, to testify and be examined under oath concerning his property, income, rights and credits, and any and all of his assets or other means for satisfying the said judgment,

and (2) producing for examination by the judgment-creditor and its attorneys at such time and place such books, records and papers of the judgment-debtor as should be material and necessary on such examination, and (3) paying any and all costs and disbursements which might thereafter be awarded to the judgment-creditor or its attorneys in connection with this proceeding; and

Said order having provided that:

"the punishment, costs and disbursements, if any, to be imposed upon said judgment-debtor for his contempt herein are left open subject to being fixed by supplemental order of the Court to be entered herein upon application made upon two days' notice by counsel for the judgment-creditor to Messrs. Hirsh, Newman, Reass & Becker of 100 Broadway, New York City, as attorneys for the judgment-debtor, at any time after January 6, 1936;" and

An appeal having been taken by the judgment-debtor [fol. 85] from said order to the United States Circuit Court of Appeals for the Second Circuit, and a supersedeas having been granted on such appeal, and a motion having been made by the judgment-creditor to dismiss said appeal and said motion having been granted by an order of said United States Circuit Court of Appeals, dated January 20, 1936, and entered in the office of the Clerk of said Circuit Court of Appeals on January 21, 1936; and

It having been shown that the judgment-debtor has failed to purge himself of his contempt of court in that he has failed either to appear or to produce books, records or papers as required by the aforesaid order of this Court entered December 20, 1935, and that he still refuses either to appear or to produce such books, records or papers,

Now, on reading and filing the papers hereinabove recited and the papers recited in said order of December 19, 1935, and upon the annexed affidavit of Samuel B. Stewart, Jr., sworn to February 3, 1936, and the affidavits of William Fox and Daniel G. Rosenblatt in opposition, and on motion of Messrs. Cravath, de Gersdorff, Swaine & Wood, attorneys for said judgment-creditor, it is

Ordered that said judgment-debtor be and he is hereby fined for said contempt (of which he was adjudged guilty by said order entered December 20, 1935) in the sum of $235,082.03, the amount remaining due and unpaid on ac-

count of said judgment to the date of this order, and it is further

Ordered that the judgment-debtor is hereby directed to pay the amount of such fine to the judgment-creditor forthwith at the office of its attorneys herein, and it is further [fol. 86] Ordered that the judgment-debtor is hereby directed to pay to the attorneys for the judgment-creditor the sum of $10,000.00 as and for their costs of this proceeding, and it is further

Ordered that said costs be paid to the attorneys for the judgment-creditor at their offices, No. 15 Broad Street, in the Borough of Manhattan, City of New York, on or before the 28th day of February, 1936, and it is further

Ordered that a warrant issue herein directed to the United States Marshal for the Southern District of New York, commanding him forthwith to arrest said debtor and commit him to jail and hold him in close custody until he shall (1) pay said costs and (2) submit to examination pursuant to the aforesaid subpoena or make full payment of the fine hereinabove imposed, which fine, when paid, shall be applied toward the satisfaction of the judgment herein, or until he shall be discharged according to law, and it is further

Ordered that service of a copy of this order upon Messrs. Hirsh, Newman, Reass & Becker, attorneys for said judgment-debtor, on or before February 20th, 1936, shall be deemed sufficient service thereof for all purposes.

Enter.

Wm. Bondy, U. S. D. J.

[fol. 87] In United States District Court, Southern District of New York

[Title omitted]

Petition for Appeal

To the Honorable Judges of the District Court of the United States of the Southern District of New York:

The petitioner, William Fox, appearing specially herein by his attorneys, Hirsh, Newman, Reass and Becker, feeling aggrieved by the order made on December 19, 1935, by

this Court and filed therein on December 20, 1935, which grants the motion to punish the judgment debtor as and for a civil contempt, and the final order made on February 7, 1936 by this Court, and filed therein on February 20, 1936, which fixes the punishment of the judgment debtor as and for said civil contempt, does hereby appeal from the said orders of this Court to the United States Circuit Court of Appeals for the Second Circuit, on the ground that certain errors, more fully set forth in the assignment of errors, were committed to the prejudice of this petitioner, and that a transcript of the record of proceedings and papers upon which the said orders were made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Second Circuit.

[fol. 88] Wherefore, this petitioner prays for an appeal from said orders to the United States Circuit Court of Appeals for the Second Circuit, that the same shall operate as a supersedeas of the orders given in the District Court, for the reversal of the errors so complained of, for allowance of said appeal, for leave to prosecute the same, and the reversal of said orders.

Dated, New York, February 20, 1936.

Hirsh, Newman, Reass & Becker, Attorneys Appearing Specially Herein for Petitioner, William Fox, Judgment-Debtor, Appellant, 100 Broadway, New York City.

O. K. J. A. C.

[fol. 89] In United States District Court, Southern District of New York

[Title omitted]

Assignment of Errors

Now comes the petitioner, William Fox, appearing specially herein by his attorneys, Hirsh, Newman, Reass and Becker, and files the following assignment of errors and says that the orders made in this cause on December 19, 1935, filed December 20, 1935, and on February 7, 1936,

filed February 20, 1936, are erroneous and unjust for the following reasons:

1. The Court erred in granting the motion of the judgment creditor (respondent) to punish the judgment debtor as and for a civil contempt of this Court.

2. The Court erred in failing to deny the said motion to punish the judgment debtor as and for a civil contempt of this Court.

3. The Court erred in refusing to find that process to commence an action or special proceeding must be served on the defendant or judgment debtor, as the case may be, within the territorial limits of the United States District Court for the Southern District of New York.

[fol. 90] 4. The Court erred in refusing to find that the subpœna in supplementary proceedings constitutes the process which commences that special and independent proceeding known as "Proceedings Supplementary to Judgment."

5. The Court erred in refusing to find that failure to obey a void process does not constitute civil contempt of court.

6. The Court erred in refusing to find that Section 28 of the U. S. Code Ann. 654, providing for the service of a subpoena within one hundred (100) miles from the courthouse, refers only to witnesses in a proceeding which is pending and which was validly instituted and can not be the basis of instituting an action or special proceeding, and in refusing to find that the said Section 28 of the U. S. Code Ann. 654, is not applicable to the instant proceedings.

7. The Court erred in making the order dated December 19, 1935, filed herein on December 20, 1935.

8. The Court erred herein in making the order dated February 7, 1936, and filed herein on February 20th, 1936.

9. The Court erred in fin-ing the judgment debtor the amount alleged to be due and unpaid on account of the judgment herein.

10. The Court erred in directing the judgment debtor to pay to the attorneys for the judgment creditor the sum of $10,000, as and for the costs of this proceeding.

[fol. 91] Wherefore, petitioner William Fox prays that the orders made on December 19, 1935, filed December 20, 1935, and on February 7, 1936, filed February 20, 1936, by the United States District Court for the Southern District of New York, be reversed and that the said District Court be directed to enter an order denying the said motion to punish the said judgment debtor as and for a civil contempt of this Court.

Dated, New York, February 20, 1936.

Hirsh, Newman, Reass & Becker, Attorneys appearing Specially herein for Petitioner, Judgment-Debtor, Appellant, 100 Broadway, Borough of Manhattan, City of New York.

O. K. J. A. C.

[fol. 92] In United States District Court, Southern District of New York

[Title omitted]

Order Allowing Appeal with Supersedeas

This 20th day of February, 1936, comes the judgment debtor, appearing specially herein by his attorneys, and files herein and presents to the Court a Petition for allowance of an appeal and assignment of errors intended to be argued by him and praying also that a transcript of the record and proceedings and papers upon which the orders herein were rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the Court does hereby allow the appeal and orders that the same shall operate as a supersedeas of the orders made in the District Court on December 19, 1935, filed December 20, 1935, and on February 7, 1936 and filed February 20, 1936, and that a transcript of the record, proceedings and papers in this case, duly authenticated, shall be sent to the Circuit Court of Appeals for the Second Circuit.

[fol. 93] On further consideration, the Court does hereby stay the judgment creditor, its agents and attorneys and

any United States Marshal, from taking any and all proceedings of any kind or nature pursuant to the orders obtained in the District Court on December 19, 1935 and filed December 20, 1935, and on February 7, 1936 and filed February 20, 1936, until the hearing, determination of the Circuit Court of Appeals for the Second Circuit, and service of an order thereon with notice of entry.

Dated New York, February 20, 1936.

Martin T. Manton, United States Circuit Judge for the Second Circuit.

A true copy. Charles Weiser, Clerk. (Seal District Court of the United States, Southern District of N. Y.)

[fol. 93½] [Endorsed:] Sir: Please take notice that the within is a true copy of an order allowing appeal and supersedeas this day duly made and entered herein in the office of the Clerk of the within named Court. Dated, New York, Feb. 20, 1936. Yours, &c., Hirsh, Newman, Reass & Becker, Attorneys appearing specially for judgment debtor, 100 Broadway, New York City. To Cravath De Gersdorff, Swaine, Wood, Esqs., Attorney for Judgment Creditor. To United States Marshal. Certified copy received February 20, 1936, Cravath De Gersdorff, Swaine & Wood, Attorneys for Judgment Creditor.

[fol. 94] Bond on Appeal for $250.00, approved and filed Feb. 20, 1936, omitted in printing.

[fols. 95 & 96] Citations, in usual form, showing service on Cravath De Gersdorff, Swaine & Wood, filed Dec. 23, 1935, and Feb. 21, 1936, omitted in printing.

[fol. 97] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 98] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of Supplementary Proceedings of CAPITAL COMPANY, a California Corporation, Judgment-Creditor, Appellee,

against

WILLIAM FOX, Judgment-Debtor, Appellant

NOTICE OF MOTION TO DISMISS

SIRS:

Please take notice that upon the annexed affidavit of Samuel B. Stewart, Jr., verified the 2nd day of January, 1936, and upon the papers and proceedings in these supplementary proceedings filed in the District Court of the United States for the Southern District of New York, and upon the order of said United States District Court for the Southern District of New York in said supplementary proceedings dated December 19, 1935, and filed December 20, 1935, the petition for appeal by Messrs. Hirsh, Newman, Reass & Becker, attorneys appearing specially for the Judgment-Debtor, Appellant and dated December 21, 1935, the assignment of errors signed by said attorneys and dated December 21, 1935, the order of Honorable Martin T. Manton allowing this appeal with supersedeas and dated December 21, 1935, the citation signed by Honorable Martin T. Manton directed to the above-named appellee and dated December 21, 1935, and the bond for costs herein executed [fol. 99] on December 21, 1935, on behalf of William Fox as principal and American Surety Company of New York as surety and approved by Honorable Martin T. Manton on December 21, 1935, the undersigned will move this Court at the Court Room thereof in the United States Court Rooms and old Post Office Building in the Borough of Manhattan, City, County and State of New York on the 6th day of January, 1936, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order:

(1) Dismissing the appeal allowed and vacating the supersedeas granted in the above-entitled proceeding on the ground that the order appealed from is not such as this Court has jurisdiction to review; or in the alternative

(2) Vacating said supersedeas (a) unless and until the appellant shall deposit an undertaking, with good and sufficient surety, to be approved by the Court, to secure the payment of the unpaid balance of the judgment heretofore entered herein upon confession, together with a sum sufficient to cover interest thereon to the probable date of the decision in this Court and an additional 5% of the amount of such judgment to cover prospective costs to be awarded by the District Court in these supplementary proceedings in the event of an affirmance or dismissal of the appeal by this Court, and (b) unless the appellant shall cause the record herein to be returned to this Court and shall serve his brief on appeal upon the attorneys for the appellee by such dates during the present term as may be fixed respec-
[fol. 100] tively by the Court, and shall be actually ready to argue the appeal upon a day certain to be fixed by the Court at this term; and

(3) Granting such other further and different relief as to the Court may seem fit and proper.

Dated New York, N. Y., January 2, 1936.

Yours, etc., Cravath, de Gersdorff, Swaine & Wood, Attorneys for Judgment-Creditor, Appellee, Office and Post Office Address: No. 15 Broad Street, Borough of Manhattan, New York City.

To Messrs. Hirsh, Newman, Reass & Becker, Attorneys for Judgment-Debtor, Appellant, appearing specially herein, Office and Post Office Address: No. 100 Broadway, Borough of Manhattan, New York City.

[fol. 101] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF SAMUEL B. STEWART, JR.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Samuel B. Stewart, Jr., being duly sworn, deposes and says:

I am an attorney and counsellor-at-law associated with the firm of Cravath, de Gersdorff, Swaine & Wood, attorneys for the Judgment-Creditor, Appellee in the above-entitled matter. I am making this affidavit in support of the within motion of said Judgment-Creditor, Appellee (1) to dismiss the appeal and vacate the supersedeas or, in the alternative, (2) to vacate the supersedeas unless the appellant complies with certain conditions set forth in the notice of motion. The motion to dismiss the appeal is based upon matters of law explained in a brief to be submitted to the Court herewith, and if the appellee is correct in its contention that the appeal should be dismissed, the alternative relief and the facts hereinafter set forth need not be considered. If, on the other hand, the Court should disagree [fol. 102] with the appellant and should hold that it has jurisdiction to consider the appeal, then it is submitted that the supersedeas should be vacated unless the appellant shall forthwith comply with two conditions: (1) deposit an adequate bond to secure to the appellee, not only the costs of the appeal, but the amount of the judgment and the costs in the supplementary proceedings, collection of which is being forestalled during the pendency of the appeal by the fact that the supersedeas is outstanding, and (2) be ready to argue the appeal at the present term of this Court on a day to be fixed by the order on this motion.

The appeal attempted to be taken is from an order of the United States District Court for the Southern District of New York dated December 19, 1935 (a copy of which is annexed hereto marked Exhibit A), finding the Judgment-Debtor, Appellant guilty of a civil contempt of court in hav-

ing disobeyed a subpœna in supplementary proceedings by failing to appear for examination as required by said subpœna, finding that he had failed satisfactorily to excuse or explain said contempt and that such misconduct was willful and calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the Judgment-Creditor, Appellee. Said order did not fix the punishment of the appellant for such contempt, but expressly left that matter open subject to being fixed by supplemental order of the District Court to be entered upon application made after January 6, 1936, until which time the appellant was given leave to purge himself of the contempt by appearing on that day for the examination required by the subpœna on which he had defaulted.

This appeal is merely the latest step of the appellant in [fol. 103] a long series of efforts to delay, defeat, impair, impede and prejudice the rights and remedies of the Judgment-Creditor, Appellee herein in the collection of the judgment in the sum of $297,412.91 entered in its favor against the Judgment-Debtor, Appellant by the United States District Court for the Southern District of New York on July 18, 1935, upon a confession of judgment theretofore executed by this Judgment-Debtor, Appellant.

I am informed and verily believe that no part of said judgment has been paid except that there has been credited and realized on account thereof the sum of $70,315.94, which sum includes:

$604.64	paid on account of rent on May 8, 1935;
11.92	interest thereon from May 8, 1935, to and including July 18, 1935, date of entry of judgment;
2,491.03	premium on Owners' Landlords and Tenants Insurance Policy;
53.51	interest thereon from March 29, 1935, to and including July 18, 1935;
9.00	adjustment of interest on taxes;
881.99	personal property taxes paid;
3.05	interest thereon from July 1, 1935, to and including July 18, 1935;
49,246.50	proceeds of sale on August 26, 1935, of chattels pledged as security for defendant's obligations;
5,000.00	proceeds of sale on August 26, 1935, of stock pledged as security for defendant's obligations;

11,536.96 paid by United States Fidelity and Guaranty Company, of Maryland on July 30, 1935;

477.34 collected under execution levied against bank account maintained by defendant in Bankers Trust Company, New York City, on August 1, 1935.

[fol. 104] The source of my information and the grounds for my belief as to these facts are the records of said firm of Cravath, de Gersdorff, Swaine & Wood, which has had charge of all efforts to collect said judgment within the States of New York and New Jersey, and telegrams and correspondence from Herbert H. Salinger of the firm of Bacigalupi, Elkus & Salinger, attorneys, having their office at No. 485 California Street, San Francisco, California, who, I am informed and believe, have charge of all efforts to collect said judgment in California and who have supplied me with documentary evidence of the two sales of assets held on August 26, 1935, and have informed me that such sales were in all respects proper and in accordance with California law. I am further informed by officers of the Judgment-Creditor, Appellee Capital Company that said Judgment-Creditor, Appellee has received no payments on account of said judgment other than the foregoing.

As a result of the foregoing, interest has accrued at the legal rate of 6% per annum on the amounts from time to time unpaid on account of said judgment as follows:

On $293,357.77 from July 18, 1935, to and including July 30, 1935	$578.68
On $281,820.81 from July 30, 1935, to and including August 1, 1935	92.65
On $281,343.47 from August 1, 1935, to and including August 26, 1935	1,154.15
On $227,096.97 from August 26, 1935	4,741.04
Total interest to and including December 31, 1935	$6,566.52

Interest will, of course, continue to accrue at the legal rate of 6% per annum upon the unpaid balance of said judgment until paid.

Because the alternative relief sought on this motion with [fol. 105] respect to an increase in the amount of the bond and the requirement of an immediate hearing of the appeal as suggested conditions to the continuance of the supersedeas are matters in the discretion of the Court, and because that discretion may properly be influenced by a determination that the appeal is not taken in good faith, and because it is respectfully submitted that the past history of this litigation contains convincing evidence that the sole purpose of the appeal is to delay and defeat the Judgment-Creditor, Appellee in the collection of a confessed judgment of more than $200,000, I respectfully beg the indulgence of the Court in the following recital of pertinent facts bearing upon the past history of this litigation.

The judgment, pursuant to which these proceedings supplementary to judgment have been commenced, is based upon an indebtedness for rent upon a theatre in San Francisco, California, payment of which rent was guaranteed in writing by this Judgment-Debtor. After numerous demands over a period of months had failed to produce any satisfactory arrangement for the payment of this obligation, your deponent was instructed by the Judgment-Creditor to commence action against this Judgment-Debtor to recover the sums due. Although this Judgment-Debtor was conceded to be domiciled in this State and to have a place of residence in the Borough of Manhattan, City of New York, in this District, and another place of residence in the County of Nassau in the Eastern District of New York, and although his present attorneys, Messrs. Hirsh, Newman, Reass & Becker, were informed by your deponent of the desire to serve Mr. Fox and although three process servers including one Deputy United States Marshal made numerous efforts to effect service upon him, it was only after such efforts had been continued for a period of ap- [fol. 106] proximately two months and after a proposed order for substituted service had been prepared for signature by the Court and the Judgment-Debtor's attorneys informed of this fact that they consented to put in an appearance for him in the action.

Then after the service of the complaint Mr. Fox's attorneys asked for all the time to answer that your deponent would give them. Shortly after receiving an answer on behalf of Mr. Fox, your deponent made a motion for sum-

mary judgment in the District Court which was adjourned for a long period of time pending negotiations between Mr. Fox and the Judgment-Creditor and which was ultimately withdrawn upon the execution by Mr. Fox of a confession of judgment for the full amount of the claim. This confession of judgment was executed by Mr. Fox on May 3, 1935, in connection with a stipulation between the attorneys that judgment should not be entered prior to July 13, 1935, which stipulation was granted by your deponent upon the assurances of the Judgment-Debtor and his attorneys that efforts were being made to work out a reorganization of the Judgment-Debtor's affairs which would make possible a payment of the judgment in full by July 13, 1935.

A few days prior to July 13, 1935, an officer of the Judgment-Creditor communicated with your deponent stating that Mr. Fox had been in direct communication with certain other officers of the Judgment-Creditor in California attempting to arrange a further delay of the judgment day. Your deponent was informed and believes that such negotiations fell through, however, and consequently your deponent's firm was instructed to enter the judgment which was done on July 18, 1935, after an application by the [fol. 107] Judgment-Debtor's attorneys to stay the entry of this judgment had been refused by Judge Bondy of the District Court.

Your deponent is further informed and believes that on July 17, 1935, the Judgment-Debtor was testifying in an examination before trial in another action and that such examination was taking place in Mineola, Long Island, in the Eastern District of New York and well within 100 miles of this Court House; that substantially coincident with the entry of this judgment, however, that examination was adjourned to the Hotel Claridge in Atlantic City, New Jersey. It was during the course of one of the hearings on this examination at the Hotel Claridge, as your deponent is informed and believes, that service upon Mr. Fox of a subpœna was first effected. That subpœna was ultimately set aside by Judge Patterson of the District Court because served more than 100 miles from the Court House.

Following the decision by Judge Patterson, a new subpœna in supplementary proceedings was issued by the District Court on September 28, 1935, directing the Judgment-Debtor to appear in the District Court for examination on

Tuesday, October 15, 1935. This subpœna was served upon the Judgment-Debtor on a railroad train entering the City of Philadelphia at a point which was 82.6 miles from Pennsylvania Station, New York City, and well within 100 miles of this Court House, on October 8, 1935, seven days before the return day of said subpœna. Although this service complied in all particulars with the requirements prescribed by Judge Patterson in his decision setting aside the previous service, the Judgment-Debtor neither appeared nor moved to set aside such subpœna, but failed to answer when his [fol. 108] name was called in open court on the return day of the subpœna, at which time your deponent was present and prepared to examine him. His default was duly noted.

The Judgment-Debtor, Appellant has persistently refused to appear at any time or place for the purpose of giving testimony respecting his assets and has resorted to every known technicality to avoid the necessity of such appearance. Indeed, after the District Court handed down its opinion stating that the Judgment-Debtor, Appellant was guilty of contempt of court and before any order had been entered thereon, Judge Bondy held two conferences with counsel for both sides at which he received reports from two different doctors as to the physical condition of the Judgment-Debtor with respect to his ability to appear for examination, and at those conferences your deponent voluntarily offered to go to Toronto, Canada, where the Judgment-Debtor then was, to examine him in order to save him the small trouble involved in a trip to New York City. Judge Bondy openly stated that he regarded the doctor's reports as extremely weak evidence of inability to appear for examination, but upon an appeal by Mr. Daniel G. Rosenblatt,, of counsel for the appellant, that the appellant be allowed to enjoy the Christmas season without worry about an examination which might have a bad effect upon his health, and upon the definite assurance of Mr. Rosenblatt that he would produce Mr. Fox for examination either in Toronto or at some other mutually agreeable place after the first of the year, Judge Bondy signed the order providing that the appellant might be purged of his contempt by such an appearance for examination, and reserved decision as to the [fol. 109] nature and extent of his punishment in the event that he should fail so to purge himself, so that no order has been entered up to the present time fixing such punishment

or fixing the costs to be awarded to the Judgment-Creditor, Appellee in that connection.

No word of any kind has been received by your deponent from Mr. Rosenblatt or any of the other attorneys for the appellant herein since this last conference with Judge Bondy, except by the service of the papers in connection with the appeal to this Court. Those papers indicate on their face that the order allowing the appeal with a supersedeas, fixing the return of the Citation for March 2, 1936 (contrary to the requirement of Rule XIII, subd. 6, of the rules of this Court that "all citations must be made returnable not exceeding thirty days from the day of signing the citation"), and requiring no bond except a $250 cost bond, was secured, without notice to counsel for the Judgment-Creditor, Appellee, from a Judge of this Court, rather than upon application to the District Judge who was familiar with the facts, and without disclosure in the papers of the foregoing facts showing the necessity for a large bond and an immediate hearing in order to prevent gross injustice.

In these circumstances it can only be assumed that the supersedeas was secured from a Judge of this Court by the attorneys for the appellant without disclosing all the material facts in a desperate effort to avoid the embarrassment involved in their inability to produce an evasive client in [fols. 110-115] accordance with their good faith agreement with the District Court. It is respectfully submitted that such tactics, whatever the cause, should not be tolerated by this Court and that if this Court should fail to dismiss the appeal herein, it should speedily rectify the injustice which will result from an unconditional continuance of the supersedeas herein and the long delayed return date of the citation by granting the alternative relief prayed for on this motion and making the continuance of such supersedeas dependent upon (1) the immediate deposit of an undertaking with good and sufficient surety to be approved by the Court, such undertaking to be in the sum of $250,000, sufficient to cover the total unpaid balance of the judgment heretofore secured herein, together with interest to the probable date of payment and costs upon this appeal plus the sum of 5% of the total amount of such judgment allowable as costs in supplementary proceedings, which have not yet been fixed by the District Court, and (2) the bringing on

since that summons or that process could not have been served outside of the territorial limits of the United States District Court for the Southern District of New York, any service made outside of those territorial limits was void and absolutely of no effect. Therefore, when the Court below punished the judgment-debtor for failing to obey a process which in and of itself was void, it rendered the decision of the Court below subject to appeal, by reason of a wrongful jurisdictional determination.

It is of no consequence that the order appealed from did not fix the punishment for the alleged contempt. The order of the Court below assumes jurisdiction of the judgment-debtor when it had none. That order is, therefore, appealable to this Court.

If this Court or any other Court should require the judg-[fol. 119] ment-debtor, William Fox, to deposit an undertaking in the manner and to the extent requested by the judgment-creditor, it would be a denial of justice.

The judgment-debtor, William Fox, is in no position financially to post any bond. The other infirmities from which Mr. Fox is now suffering will be discussed later in this affidavit, but insofar as his financial condition is concerned, it may be reported that he does not have the wherewithal to give any other bond other than that which he has heretofore supplied. There is, moreover, no reason why any further bond should be required, except to prevent an appeal from an erroneous decision below and in an attempt to impose upon Mr. Fox such burdens which would prevent him from prosecuting such an appeal.

There is nothing in the moving affidavit or in the judgment-creditor's memorandum of law which warrants any additional bond. This is not an appeal from a money judgment. This is not an appeal from a decree affecting any real property or any other res. It is an appeal from a final determination of the Court below assuming jurisdiction in personam in the face of overwhelming authority conclusively demonstrating that the Court below had no such jurisdiction. The supersedeas does not stay the judgment-creditor from proceeding to enforce collection of the judgment.

It is respectfully submitted, therefore, that the first condition which the judgment-creditor seeks to impose should be denied.

The second condition is that the record herein should be returned to this Court, the brief served and the argument held on certain specified dates. So long as reasonable time is given for the printing of the record and the preparation of the brief and the argument of the appeal, no contest is made as to the time when these acts should be done. Coun-
[fol. 120] sel for the judgment-creditor should at least cooperate in an effort to afford us reasonable time in which to prepare the briefs and the argument of this appeal.

It is respectfully submitted, in view of the important issues involved herein, that March 2, 1936 is the earliest date when the argument of the appeal should proceed.

Counsel for the judgment-creditor overlooks the fact that the acts of counsel for the judgment-debtor upon this appeal evidence a desire for a prompt adjudication. There is no requirement in the law that a citation issue simultaneously with the order allowing the appeal. The law requires that an appeal be taken within a period of three months after the entry of the judgment, decree or order appealed from. Despite these provisions of law which would have enabled the judgment-debtor to have delayed taking the appeal and arguing it, the judgment-debtor, within 3 days after the Court below signed the order, prepared, submitted and had signed the necessary papers permitting this appeal.

The judgment-creditor has utilized many pages in an attempt to show in its memorandum that the judgment-debtor has caused undue delay; that all the equities lie with the judgment-creditor, and that no consideration should be accorded to the judgment-debtor. Before demonstrating the falsity of these charges, we do not hesitate to state that even if these claims were true, which they are not, it would not make the slightest difference so long as the Court below never had jurisdiction of the judgment-debtor.

The judgment-creditor claims that William Fox, the judgment-*creditor,* avoided service of process when the action was instituted, but at page "6" of the moving affi-
[fol. 121] davit, it concedes that we, as counsel, appeared for him without the necessity of effecting service, and that thereafter, the judgment-debtor, William Fox, signed a confession of judgment without putting the judgment-creditor to its proof.

Does this evidence any intention to harass or annoy, or does it not, on the contrary, show a willingness and in

fact, a desire on the part of the judgment-debtor to co-operate and to obviate any unnecessary burdens upon the judgment-creditor?

The judgment-creditor claims that on the judgment herein the judgment-debtor is entitled to certain credits which leaves a net amount due of approximately Two Hundred and Twenty-Five Thousand ($225,000) Dollars. This is not true.

Among the items of credit given to the judgment debtor appearing at page "3" of the moving affidavit, is the sum of $49,246.50, which is alleged to represent

"proceeds of sale on August 26, 1935, of chattels pledged as security for defendant's obligations."

The fact is that these chattels which were taken by the judgment-creditor have a present value in excess of $440,000 and a replacement value in excess of $800,000. There is annexed hereto and made part hereof an affidavit which was submitted in a proceeding pending in the District Court of the United States in and for the Northern District of California, Southern Division, which affidavit is marked "Exhibit A", and was made by one H. I. Tegtmeier, whose experience and opinion and qualifications are well recognized, as an expert on the question of the value of these particular chattels. The attempt on the part of the judgment-creditor to limit the allowance to the judgment-debtor [fol. 122] to less than $50,000 for chattels which it personally acquired when the present value is in excess of $440,000 and the replacement value is twice that amount, constitutes gross fraud on the part of the judgment-creditor. Hence, if the judgment-creditor would allow to the judgment-debtor, as credit, the reasonable value of the chattels, there would be ample to pay the full amount of the judgment and a surplus of over $200,000 which should be returned to the judgment-debtor.

So, at the outset, we find that the judgment-creditor has no just grievance against the judgment-debtor, but on the contrary, the judgment-debtor has a claim against the judgment-creditor, which it is now in the process of proving.

There is now pending in the Supreme Court of the State of New Jersey, an action instituted by the judgment creditor against the judgment-debtor on the judgment which

was obtained in the court below. In that New Jersey action, the complaint was served on Mr. Fox on September 14, 1935 in Atlantic City, New Jersey. He appeared on September 20, 1935, and demanded full particulars as to the sale of the above chattels, the circumstances of the sale, the party who acquired the chattels and the reason why only the sum of $49,246 credit was given. Under the practice of the Courts of the State of New Jersey, no answer need be filed unless and until the particulars of the complaint are served. For reasons best known to the judgment-creditor, it has refrained from serving the particulars and has delayed prosecuting that action, although nearly four (4) months have expired since that action was commenced.

The judgment-debtor in that action is prepared to and will prosecute its defense; will show that the judgment has [fol. 123] been paid and upon the adjudication in that Court, will then proceed to vacate the judgment in this Court.

The judgment-creditor knows of these facts; knows that its judgment has been more than paid, and therefore, is attempting here and now, unreasonably to press this appeal to gain an unfair and unjust advantage.

At the bottom of page "4" and top of page "5" of the moving affidavit, the judgment-creditor concedes that,

"the alternative relief sought in this action with respect to an increase in the amount of the bond and the requirement of an immediate hearing of the appeal * * * are matters in the discretion of the Court."

Since the judgment-creditor comes before this Court pleading for the exercise of its discretion, it is respectfully urged that such discretion should be exercised in an effort to afford the judgment-debtor and his counsel a reasonable time in which to present to this Court the problem which goes to the very essence of Federal jurisdiction.

There is one reason and only one why Mr. Fox has not been examined in supplementary proceedings. His health does not permit it. To subject him to any legal proceedings and examination at this time would have an effect dangerous to his health, and according to medical reports, possible fatal consequences. When his health permits and that should be in a few months, he will voluntarily appear.

In fact, it was in the midst of a hearing before a Referee in Mineola, Long Island when on July 17, 1935, Mr. Fox collapsed which made necessary his departure for Atlantic City, New Jersey. In that particular legal proceeding, our adversaries had Mr. Fox physically examined by an [fol. 124] independent physican, who corroborated the fact that Mr. Fox was in no condition physically or mentally to proceed with the Reference. Any unfavorable inference which counsel for the judgment-creditor seeks to draw from the fact that the Reference did not continue after July 17, 1935 in Mineola is entirely erroneous.

The judgment-creditor attempts to make much of the fact that the Court below was not impressed with the affidavits that were presented to it by the doctors who swore that Mr. Fox's health was such that he should not be subjected to any examination either here or elsewhere for a period of six (6) months, and that to subject him to such examination would be highly detrimental to his health and permanently injurious and possibly fatal.

The first doctor's report that was submitted was a report that had been prepared by an independent physician appointed by the Supreme Court of the State of New York in another action there pending and filed in that Court on December 3, 1935. That showed that Mr. Fox was undergoing treatment in the Toronto General Hospital, Toronto, Canada, under the supervision of Sir Frederick Banting, the discoverer of Insulin and a preeminent medical authority. After reading this report the Court below stated that it wanted a personal statement from Sir Frederick Banting. An affidavit was shortly thereafter prepared by Sir Frederick Banting and sworn to by him, under date of December 16, 1935, in which Sir Frederick stated that when he first examined Mr. Fox on October 23, 1935, he determined that Mr. Fox "must have complete rest and physical relaxation for at least six months." He states, therefore, in concluding his affidavit that although between October [fol. 125] 23, 1935 and December 13, 1935, Mr. Fox has improved slowly, nevertheless, it would be

"detrimental to Mr. Fox's present medical condition for him either to go to New York or be subjected to examination in Toronto, as I feel that such an ordeal would put him back in the dangerous condition in which I found him during October last."

In addition, Sir Frederick Banting wrote a letter to the Court below in which he stated substantially that "Mr. Fox is a much sicker man than I would want him at this time to know."

Mr. Fox is not attempting to avoid any examination nor is he attempting to hinder and delay the judgment-creditor; the fact is that his physical condition is such that if he were subjected to any examination or legal process at this time, it would seriously jeopardize his health and constitute a grave danger to his life.

I never gave any assurance either to the Court below or to counsel for the judgment-creditor that I would produce Mr. Fox. The fact is that I would not consent to the order that was entered as I was requested to do by counsel for the judgment-creditor. I did not desire to delay the entry of any order, or to prevent the judgment-creditor from proceeding with any legal process. Therefore, I waived notice of settlement of the order appealed from. But at no time or place, did I ever, by direction or indirection, lead the Court below to conclude that I concurred with the provisions of the order. So long as there is the right to appeal from that determination we, on behalf of Mr. Fox, feeling aggrieved by that order, intend to prosecute that appeal.

When the order was signed on December 19, 1935, after discussion, with my associates and after notification to Mr. Fox of the determination of Judge Bondy, in the court be-
[fol. 126] low, I was instructed promptly to proceed with and to prosecute the appeal.

It requires very little time to prepare papers authorizing and permitting an appeal. Those papers were prepared and on Saturday, December 22, 1935, were submitted to the Presiding Justice of the Circuit Court of Appeals. The matter was fully explained to the Presiding Justice. There was no concealment. There was no subterfuge. The more thorough the investigation into the facts, the more justified was the act of the Presiding Justice of the Circuit Court of Appeals in allowing the appeal on the terms and conditions that it was allowed.

Counsel for the judgment-creditor, at page "7" of his moving affidavit states that the service made on Mr. Fox on October 7, 1935, on the train near Philadelphia, Pennsylvania, "complied in all particulars with the requirements

prescribed in his decision of Judge Patterson, setting aside the prior service." This is not true. The validity of the subpœna at issue before Judge Patterson was contested on two grounds, first, that it was invalid because served outside of the territorial jurisdiction of the United States District Court for the Southern District of New York, and secondly, because in any event, Atlantic City was more than one hundred (100) miles from New York. Judge Patterson found it unnecessary, therefore, to discuss the first point because the subpœna was concededly invalid since it was served over one hundred (100) miles away from New York. It is improper and wholly unjustified for the judgment-creditor to attempt to call out of the opinion of Judge Patterson a conclusion that if the subpœna had been served within one hundred (100) miles, it would be good. Thus, on the appeal before this Court, we contend that the serv-[fol. 127] ice of process was void because it was made outside the territorial limits of the Southern District of New York.

It is respectfully submitted, therefore, that the motion of the judgment-creditor should, in all respects, be denied, with costs.

Daniel G. Rosenblatt.

Sworn to before me this 6th day of January, 1936. Edward M. Brandriss, Notary Public, Bronx County.

[fol. 128] EXHIBIT "A" TO AFFIDAVIT

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In Equity. No. 3927 I

FOX CHICAGO REALTY CORPORATION, LTD., a Corporation, Complainant,

vs.

PACIFIC THEATRES CORPORATION, a Corporation, Defendant

Affidavit of H. I. Tegtmeier

UNITED STATES OF AMERICA,
Northern District of California,
Southern Division,
State of California,
City and County of San Francisco, ss:

H. I. Tegtmeier, being first duly sworn, deposes and says:

That he now is, and for more than eleven years last past has been, engaged in the business of furnishing and equipping theatres, and he is at the present time, and for five years last past has been, the Manager of the San Francisco Office of B. F. Shearer Company; that he has been connected with said B. F. Shearer Company during all of said eleven years last past, the first six years thereof with the San Francisco Office; that said B. F. Shearer Company is a concern engaged in the business of completely furnishing and equipping theatres (except for sound equipment and signs), doing approximately 95 per cent of the total amount of such business in the five northwestern states of the United States; that, during all of said period of eleven years last past, affiant has been engaged in the business of furnishing and equipping theatres, and affiant knows the cost of such furnishings and equipment, and the prices paid [fol. 129] therefor; that, during the period of five years last past, affiant has had personal charge of the furnishing and equipping of approximately one hundred different

theatres, and knows the cost of such furnishings and equipment, and the prices paid therefor;

That affiant has long been familiar with the furnishings and equipment of the Fox Theatre, in San Francisco, California, now under lease to and operated by the defendant in the above entitled action; and on September 25, 1935, he carefully examined said furnishings and equipment for the purpose of forming an opinion as to the present value thereof; that affiant was furthermore supplied with a copy of the chattel mortgage to Capital Company containing an inventory of said furnishings and equipment, and affiant carefully checked over said inventory; that said furnishings and equipment are all of unusually high quality and are in good condition; that, at present prices of similar furnishings and equipment at San Francisco, it would cost approximately $621,000.00 to replace said furnishings and equipment with others of like kind and quality; that, in the opinion of affiant, and taking into account depreciation in the value of said furnishings and equipment due to use and obsolescence, the present fair and reasonable value of said furnishings and equipment is $443,000.00.

H. I. Tegtmeier.

Subscribed and sworn to before me this 27th day of September, 1935. Eugene P. Jones, Notary Public in and for the City and County of San Francisco, State of California. (Notarial Seal.)

[fol. 130] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of Supplementary Proceedings of CAPITAL COMPANY, a California Corporation, Judgment-Creditor, Appellee

against

WILLIAM FOX, Judgment-Debtor, Appellant

ORDER DISMISSING APPEAL—Jan. 20, 1936

A motion having been made herein by counsel for the appellee for an order dismissing the appeal allowed herein

by order of Hon. Martin T. Manton, dated December 21, 1935, from the order entered in the United States District Court for the Southern District of New York on December 20, 1935, and to vacate the supersedeas granted in said order dated December 21, 1935, or for other alternative relief, and said motion having come on to be heard before this Court on the 6th day of January, 1936, and after hearing counsel for the respective parties;

[fol. 131] Upon consideration thereof, it is

Ordered that said motion be and hereby is granted and said appeal be and hereby is dismissed and it is

Further ordered that the supersedeas contained in said order dated December 21, 1935, be and hereby is in all respects vacated and set aside.

(Sgd.) Martin T. Manton, (Sgd.) Augustus N. Hand, U. S. C. J.

[fol. 132] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 133] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of Supplementary Proceedings of CAPITAL COMPANY, a California Corporation, Judgment-Creditor, Appellee,

against

WILLIAM FOX, Judgment-Debtor, Appellant

NOTICE OF MOTION TO DISMISS

SIRS:

Please take notice that upon the annexed affidavit of Samuel B. Stewart, Jr., verified the 27th day of February, 1936, and upon the papers and proceedings in the Supplementary Proceedings filed in the District Court of the United States for the Southern District of New York, and upon the order of said United States District Court for the

Southern District of New York in said Supplementary Proceedings, dated December 19, 1935, and filed December 20, 1935, and upon the order of said Court, dated February 7, 1936, and filed February 20, 1936, the petition for appeal by Messrs. Hirsh, Newman, Reass & Becker, attorneys appearing specially for the Judgment-Debtor, Appellant, dated February 20, 1936, the assignment of errors signed by said attorneys and dated February 20, 1936, the order of Honorable Martin T. Manton allowing this appeal with su- [fol. 134] persedeas, dated February 20, 1936, the citation signed by Honorable Martin T. Manton, directed to the above named appellee and dated February 20, 1936, and the bond for costs herein executed on February 20, 1936, on behalf of William Fox, as principal, and American Surety Company of New York, as surety, and approved by Honorable Martin T. Manton on February 20, 1936, the undersigned will move this Court at the Court Room thereof in the United States Court House at Foley Square, in the Borough of Manhattan, City, County and State of New York, on the 2nd day of March, 1936, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order:

(1) Dismissing the appeal allowed and vacating the supersedeas granted in the above entitled proceeding on the ground that the orders appealed from are not such as this Court has jurisdiction to review; or, in the alternative

(2) Vacating said supersedeas (a) unless and until the appellant shall deposit an undertaking, with good and sufficient surety to be approved by the Court, to secure the payment of the unpaid balance of the judgment heretofore entered herein upon confession, together with a sum sufficient to cover interest thereon to the probable date of the decision of this Court, and an additional sum sufficient to cover $10,000 costs awarded by the District Court in these Supplementary Proceedings and (b) unless the appellant shall cause the record herein to be returned to this Court and shall serve his brief on appeal upon the attorneys for the appellee by such dates during the present term as may be fixed respectively by the Court, and shall be actually ready to argue the appeal upon a day certain to be fixed by [fol. 135] the Court at this Term; and

(3) Granting such other, further and different relief as to the Court may seem fit and proper.

Dated, New York, N. Y., February 27, 1936.

Yours, etc., Cravath, de Gersdorff, Swaine & Wood, Attorneys for Judgment-Creditor, Appellee, Office and Post Office Address: No. 15 Broad Street, Borough of Manhattan, New York, N. Y.

To Messrs. Hirsh, Newman, Reass & Becker, Attorneys for Judgment-Debtor, Appellant, Office and Post Office Address: No. 100 Broadway, Borough of Manhattan, New York, N. Y.

[fol. 136] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF SAMUEL B. STEWART, JR.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Samuel B. Stewart, Jr., being duly sworn, deposes and says:

I am an attorney and counsellor-at-law associated with the firm of Cravath, de Gersdorff, Swaine & Wood, attorneys for the Judgment-Creditor, Appellee in the above-entitled matter. I am making this affidavit in support of the within motion of said Judgment-Creditor, Appellee (1) to dismiss the appeal and vacate the supersedeas or, in the alternative, (2) to vacate the supersedeas unless the appellant complies with certain conditions set forth in the notice of motion. The motion to dismiss the appeal is based upon matters of law explained in a brief to be submitted to the Court herewith, and if the appellee is correct in its contention that the appeal should be dismissed, the alternative relief and the facts hereinafter set forth need not be considered. If, on the other hand, the Court should disagree [fol. 137] with the appellant and should hold that it has jurisdiction to consider the appeal, then it is submitted that

the supersedeas should be vacated unless the appellant shall forthwith comply with two conditions: (1) deposit an adequate bond to secure to the appellee, not only the costs of the appeal, but the amount of the judgment and the costs in the supplementary proceedings, collection of which is being forestalled during the pendency of the appeal by the fact that the supersedeas is outstanding, and (2) be ready to argue the appeal at the present term of this Court on a day to be fixed by the order of this motion.

The appeal attempted to be taken is from two orders of the United States District Court for the Southern District of New York, the first, dated December 19, 1935 (a copy of which is annexed hereto, marked Exhibit A), adjudging appellant guilty of a civil contempt of court in having disobeyed a subpœna in Supplementary Proceedings by failing to appear for examination as required by said subpœna, and the second, dated February 7, 1936 (a copy of which is annexed hereto, marked Exhibit B), fixing his punishment for such contempt. The second order imposed a fine in the amount of the unpaid balance of the judgment, with interest to the date of the order,—a total sum of $235,082.03. It directed the Judgment-Debtor to pay to the attorneys for the Judgment-Creditor the sum of $10,000 for their costs of this proceeding. It also directed the issuance of a warrant to the United States Marshal for the Southern District of New York commanding him forthwith to arrest the Judgment-Debtor and commit him to jail and hold him in close custody "until he shall (1) pay said costs, and (2) submit to examination pursuant to the aforesaid subpœna or make payment of the fine hereinabove imposed, which fine, when paid, shall be applied towards the satisfaction of the [fol. 138] judgment herein, or until he shall be discharged according to law."

The earlier order, dated December 19, 1935, adjudged this Judgment-Debtor, Appellant guilty of the civil contempt of Court in question, found that he had failed satisfactorily to excuse or explain said contempt, and that such misconduct was wilful and calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the Judgment-Creditor, Appellant. Said order did not fix the punishment of the appellant for such contempt, leaving that matter open until after a date set in that order prior to

which the appellant was given leave to purge himself of contempt by appearing for the examination required by the subpœna on which he had defaulted. He did not appear to purge himself pursuant to the leave so given but instead attempted to take an appeal to this Court. A motion to dismiss such appeal upon the same grounds urged in support of the present motion was argued before this Court on behalf of the Judgment-Creditor, Appellee, and was granted without opinion by an order of this Court dated January 20, 1936.

Your deponent then made offer to the attorneys for the Judgment-Debtor, Appellant, of a further opportunity for the Appellant to purge himself of his contempt by appearing for examination pursuant to the subpœna served on him October 8, 1935, nearly five months ago, but the opportunity so offered was spurned by the Judgment-Debtor. A proposed order fixing his punishment for contempt was accordingly presented to the District Court, was fully argued by counsel for the parties, was supported and opposed by [fol. 139] voluminous papers bearing upon the proper amount of the punishment, was the subject of long deliberation by the District Court and, finally, the punishment was fixed by the order, dated February 7, 1936, and entered February 20, 1936, which order is one of the subjects of the present appeal.

This appeal is merely the latest step of the Judgment-Debtor, Appellant, in a long series of efforts on his part to delay, defeat and prejudice the rights and remedies of the Judgment-Creditor, Appellee, herein in the collection of the judgment in the sum of $297,412.91 entered in its favor against the Judgment-Debtor, Appellant, by the United States District Court for the Southern District of New York on July 18, 1935 upon a confession of judgment theretofore executed by this Judgment-Debtor, Appellant.

I am informed and verily believe that no part of said judgment has been paid, except that there has been credited and realized on account thereof the sum of $70,315.94, the items making up which sum were set forth in detail on page 3 of my affidavit, sworn to January 2, 1936 and submitted to this Court in support of the motion (granted January 20, 1936) to dismiss this Judgment-Debtor's last appeal from the order adjudging him guilty of contempt of Court,

and were also explained in detail in my affidavit sworn to February 3, 1936 in support of the order dated February 7, 1936. Deduction of the sum so realized and credited from the face amount of the judgment and addition of interest from time to time accruing on the unpaid balances of produces the sum of $235,082.03 as the unpaid balance due on this judgment on February 7, 1936, the date of the order [fol. 140] now appealed from. That sum was the sum fixed by said order of the District Court as the amount of the Judgment-Debtor's fine for contempt of Court, provision being made in the order for crediting payment of such fine against the amount of the judgment.

The Judgment-Debtor has from time to time contended that a considerably larger sum should have been credited on account of the judgment, such contention being based upon the claim that a sale at auction of certain pledged chattels in the State of California did not produce the fair and reasonable value of those chattels. In spite of the fact that the Judgment-Debtor and his attorneys were given notice of the sales of the chattels and an opportunity to be present and bid themselves, these contentions on their part will doubtless have to be litigated in an action now pending in the State of New Jersey, where such claims have been made the basis of a defense. For the purpose of the present motion, however, it is sufficient to say that Mr. Justice Bondy of the District Court, who has heard much of the argument in connection with the innumerable technical points raised by this Judgment-Debtor, and who has acquired a far greater familiarity with the true situation than it is possible to convey within the reasonable limits of these motion papers, deemed a fine in the full unpaid balance of the judgment appropriate punishment for this Judgment-Debtor's contemptuous conduct in the present case.

The history of dilatory tactics, evasions of process, disobedience and disregard of subpœnas, adjournments secured upon the basis of promises subsequently broken, and [fol. 141] open contempt not only of the District Court but of the law generally and the ability of the courts to enforce their judgments, need not be repeated here. It was set forth at length at pages 5-9 of my affidavit, sworn to January 2, 1936, and presented to this Court in support of the motion to dismiss the previous appeal from the order ad-

judging this appellant guilty of contempt of Court, and it was repeated and brought up to date in my affidavit, sworn to February 3, 1936, which was annexed to the proposed order submitted to Judge Bondy fixing the punishment of the Judgment-Debtor, which order as modified and signed by the learned Judge is the subject of this appeal. The only importance of such facts at the present time and in connection with the present motion is that they furnish a compelling reason for this Court to exercise its discretion in directing an immediate hearing and adequate security for the continuance of a supersedeas pending such hearing in order that the Judgment-Creditor, Appellee may not be more severely injured than is absolutely necessary by the dilatory proceedings to which this Judgment-Debtor is resorting in an effort to evade payment of a just debt upon which he has confessed judgment. In order that this Court may have a full picture of the attitude and acts of this Judgment-Debtor, however, bearing upon the exercise of this Court's discretion in connection with ordering an immediate hearing and providing adequate security for the continuance of a supersedeas, it is necessary to mention one fact which has occurred since the preparation of the statements in the affidavits of January 2, 1936 and February 3, [fol. 142] 1936 above referred to, and a series of acts which have been discovered since that time.

The series of acts above referred to has been discovered in the course of numerous examinations of third parties—banks and insurance companies—in supplementary proceedings, which examinations have been conducted during the past month. Such examinations have revealed assignments by this Judgment-Debtor to his wife made since October 8, 1935 (when he was served with a subpœna con-[fol. 143] taining an injunction restraining all transfers by him) of insurance policies having aggregate face values far in the excess of the amount of the judgment here involved and of other assets having a value of many thousands of dollars. In the circumstances here involved it is submitted that the motive for such assignments is obvious and that the sole purpose of creating technical obstacles such as this appeal is to afford further time within which assets may be further transferred and more effectively concealed.

It is respectfully submitted that the cases set forth in the brief submitted herewith require a finding that this Court

has no jurisdiction to hear this appeal and must dismiss it as it did the last appeal upon the ground that these orders and any other order adjudging the Judgment-Debtor guilty of a civil contempt of Court in proceedings supplementary to judgment are merely interlocutory orders and as such may not be made the subject of an appeal until an order has been entered finally terminating the Supplementary Proceedings, which unquestionably has not been done in the present case. Even if the Court should determine that it has jurisdiction, however, it is submitted that the bad faith of the Judgment-Debtor, Appellant, in prosecuting this appeal is so apparent from the facts heretofore recited that the supersedeas granted by this Court upon the deposit of a cost bond in the sum of $250 should be immediately vacated unless the Judgment-Debtor, Appellant shall forthwith comply with two conditions reasonably necessary to protect the Judgment-Creditor from further injustices pending the determination of this at best technical appeal on its merits: (1) the immediate deposit of an undertaking [fols. 144-153] with good and sufficient surety to be approved by the Court in the sum of $250,000 to cover the total unpaid balance of the judgment heretofore secured herein, together with interest to the probable date of payment and costs upon this appeal, plus the $10,000 costs fixed in the order of the District Court herein; and (2) the bringing on of this appeal for an immediate hearing at the present Term of this Court.

Samuel B. Stewart, Jr.

Sworn to before me this 27th day of February, 1936. Saul Schneiderman, Notary Public, Kings County. Kings Co. Clk's No. 1068, Reg. No. 7428. N. Y. Co. Clk's No. 1, Reg. No. 7S575. Commission expires March 30, 1937. (Seal of Saul Schneiderman, Notary Public, Kings County, N. Y.)

[fol. 154] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

AFFIDAVIT OF DANIEL G. ROSENBLATT

STATE OF NEW YORK,
County of New York, ss:

Daniel G. Rosenblatt, being duly sworn, deposes and says:

I am a member of the firm of Hirsh, Newman, Reass & Becker, attorneys appearing specially herein for the judgment debtor, appellant.

This affidavit is made in opposition to the motion of the judgment creditor, appellee, to dismiss the appeal herein, or, in the alternative, for an order vacating the supersedeas unless an additional bond is posted and the appeal is argued at an early date.

The orders appealed from are briefly described at page "2" of the moving affidavit of Samuel B. Stewart, Jr., (hereinafter referred to as "the moving affidavit"). There it appears that by order dated December 19, 1935, the judgment debtor was adjudged guilty of a contempt. By order dated February 7, 1936, the punishment was imposed. The punishment was as follows:

[fol. 155] (a) The judgment debtor was fined the full amount alleged to be due and unpaid on account of the judgment, approximately $235,000.

(b) The judgment debtor was directed by the Court to pay to counsel for the judgment creditor the sum of $10,000 for their costs.

(c) It was further provided that the judgment debtor should be committed to jail until (1) he pays the costs of $10,000 and (2) submits to examination or pays the fine.

It is thus to be noted that the order punishing the judgment debtor for contempt finally and irretrievably orders and directs the judgment debtor to pay the sum of $10,000. There is not one phase or one element of finality that is not

present in the decree and direction by the Court that the judgment debtor must pay the sum of $10,000. It is not interlocutory; it is not intermediate; it is final.

The nature of the orders of the Court below and the right to appeal therefrom will be discussed at length in the brief to be submitted on the argument of this motion. Suffice to say that judgment creditor's contention that the orders appealed from are not such as this Court has jurisdiction to review, is entirely erroneous. This Court has ample right and authority to review the determination of the Court below, in its entirety.

The judgment creditor, both in its brief and moving affidavit, makes much of the fact that heretofore, the appeal taken from the order of December 19, 1935, adjudging the judgment debtor in contempt, was dismissed by this Court without opinion.

The judgment creditor makes its own deductions for the reasons for that dismissal and now attempts to treat the present order of February 7, 1936, as being in the same category.

We, of course, submit it is not. We submit to this Court [fol. 156] that the order of February 7, 1936, supplementing the order of December 19, 1935, is a final order and that if the order of December 19, 1935 was in any respect lacking in finality, that lack is supplied in every detail by the order of February 7, 1936.

The alternative relief sought by the judgment creditor is that an undertaking with good and sufficient surety should be deposited and that the amount thereof should be approximately $250,000. There is no need for such a bond. There is not the slightest justification for such requirement.

The judgment creditor loses sight of the fact that this is an appeal from orders of the Court below which assumed to have jurisdiction when it had none and where, by reason of that unlawful and illegal assumption of jurisdiction, redress must be sought in this Court.

A still more important fact which the plaintiff judgment creditor overlooks is that this is not an appeal from the judgment in which the plaintiff is stayed from prosecuting the judgment. The plaintiff can proceed however it will in an attempt to enforce collection. The fact is that this plaintiff is proceeding in many ways to enforce collection of the judgment. Other lawsuits are pending in the Su-

preme Court of the State of New York, Nassau County, and in the State of New Jersey, Atlantic County. Other proceedings are pending in the United States District Court for the Southern District of New York arising out of and directly concerned with the judgment that was entered in the United States District Court for the Southern District of New York on July 18, 1935, none of which are prohibited by the existence of the supersedeas relating to these orders, which are now before this Court on appeal.

[fol. 157] What then is the plaintiff judgment creditor being stayed from? Nothing, other than the right to put Mr. Fox in jail.

In view of the total lack of jurisdiction of the Court below and the further inability of the judgment debtor to post a bond in excess of the bond which he has already filed in the sum of $250, we urge that it would be a gross miscarriage of justice to require and to impose as a condition to the prosecution of this appeal, the posting of a bond, which we know in advance, the judgment debtor cannot supply.

The judgment debtor, William Fox, is in no position, financially, to post any bond. Besides the physical infirmities from which Mr. Fox is now suffering, his financial condition is such that it may be reported that he does not have the wherewithal to give any other bond other than that which he has heretofore supplied. There is, moreover, no reason why any further bond should be required, except to prevent an appeal from an erroneous decision below and in an attempt to impose upon Mr. Fox such burdens which would prevent him from prosecuting such an appeal.

There is nothing in the moving affidavit or in the judgment creditor's memorandum of law which warrants any additional bond. This is not an appeal from a money judgment. This is not an appeal from a decree affecting any real property or any other res. It is an appeal from a final determination of the Court below assuming jurisdiction in personam in the face of overwhelming authority conclusively demonstrating that the Court below had no such jurisdiction. The supersedeas does not stay the judgment creditor from proceeding to enforce collection of the judgment. For these reasons the entire "Point II" of the brief [fol. 158] submitted by the judgment creditor is irrelevant and the requirements of Title 28 of the United States Code

and the rules of this Court referring to supersedeas bonds are inapplicable to our appeal.

It is respectfully submitted, therefore, that the first condition for the allowance of an appeal, i. e., the posting of an additional bond, which the judgment creditor seeks to impose, should be denied.

The further condition which the judgment creditor desires to impose is, namely, that the appeal be argued by a certain date, the record be filed by a certain date, the briefs be filed and served by a certain date. We have no quarrel with that. We do urge, however, that this Court should not lend itself to tactics which have been pursued by the judgment creditor with its staff of a dozen or more lawyers working on this matter, so that by requiring the matters to be briefed, and the appeal to be argued on a too early date, the judgment debtor be denied an opportunity properly to present his appeal.

We, therefore, submit to this Court that if it deems it either necessary or advisable to fix a date for the argument of the appeal or for any of the steps prior to the actual argument, that there be offered to the judgment debtor and his counsel, a reasonable, decent opportunity to brief and prepare the innumerable legal points involved, most of which have never yet been adjudicated by even a Court of the first instance.

The judgment creditor overlooks the fact that the acts of counsel for the judgment debtor upon this appeal evidence a desire for a prompt adjudication. There is no requirement in the law that a citation issue simultaneously with the order allowing the appeal. The law requires that an appeal [fol. 159] be taken within a period of three (3) months after the entry of the judgment, decree or order appealed from. Despite these provisions of law which would have enabled the judgment debtor to have delayed taking the appeal, the judgment debtor, promptly after the Court below signed the order of February 7, 1936, prepared, submitted and had signed the necessary papers permitting this appeal.

The judgment creditor has utilized many pages in an attempt to show in its memorandum that the judgment debtor has caused undue delay; that all the equities lie with the judgment creditor, and that no consideration should be accorded to the judgment debtor. Before demonstrating the falsity of these charges, we do not hesitate to

state that even if these claims were true, which they are not, it would not make the slightest difference so long as the Court below never had jurisdiction of the judgment debtor.

The judgment creditor claims that William Fox the judgment debtor, avoided service of process when the original action in which the judgment was obtained, was instituted, yet concedes that we, as counsel, appeared for him without the necessity of effecting service, and that thereafter, the judgment debtor, William Fox, confessed judgment without putting the judgment creditor to its proof. This judgment was entered on July 18, 1935.

The judgment creditor claims that there is a balance of $235,000 due and unpaid on the judgment. This is untrue. Among the many items of credit on the judgment given to the judgment debtor is the sum of $49,000, alleged to represent

"proceeds of sale on *August 26, 1935,* of chattels pledged as security for defendant's obligations."

[fol. 160] The fact is that these chattels which were taken by the judgment creditor have a present value in excess of $440,000 and a replacement value of more than $600,000.

There is annexed hereto as Exhibit A, a copy of an affidavit dated September 27, 1935, made by one H. I. Tegtmeier, a recognized authority on the value of these chattels. The original of this affidavit was filed in proceedings then pending in the United States District Court of the Northern District of California. If the judgment creditor would allow to the judgment debtor as credit the reasonable value of the chattels, that would be ample to pay the full amount of the judgment and leave a surplus of over $200,000.

So, at the outset, we find that the judgment creditor has no just grievance against the judgment debtor, but on the contrary, the judgment debtor has a claim against the judgment creditor which is now in the process of being proven.

There is now pending in the Supreme Court of the State of New Jersey, an action instituted by the judgment creditor against the judgment debtor on the judgment which was obtained in the Court below. In that New Jersey action, the complaint was served on Mr. Fox on September 14, 1935, in Atlantic City, New Jersey.

Within the last few weeks, the judgment creditor served the particulars required concerning its complaint. As a re-

sult, the judgment debtor then interposed his answer. That answer raised not only the inadequacy of the credit that was allowed for the chattels, but it also demonstrates and presents conclusively, facts to show that the entire foreclosure of the chattels took place in a manner that was fraudulent and secret.

[fol. 161] The judgment debtor in that action is prepared to and will prosecute its defense; will show that the judgment has been paid and upon the adjudication in that Court, will then proceed to vacate this judgment which was entered in the United States District Court in the Southern District of New York, on July 18, 1935.

The judgment creditor knows of these facts; knows that its judgment has been more than paid, and therefore, is attempting here and now, unreasonably to deny the judgment debtor the right to appeal, or, in the alternative, to deny his counsel adequate time to present the appeal.

If the judgment creditor desires a speedy disposition of these matters, it has it within its power to accomplish that. Instead, the judgment creditor has delayed the prosecution of the New Jersey action where the true merits of the dispute between the parties can be demonstrated. Obviously, the judgment creditor is not interested in obtaining an adjudication on the merits. Instead, the judgment creditor is content to threaten and intimidate the judgment debtor to pay moneys, not due. And in these threats, it is aided by the erroneous orders of the Court below.

At page "5" of the moving affidavit, the judgment creditor charges that the debtor or his counsel were guilty of obtaining "adjournments on promises subsequently broken." This is an absolute untruth. Every promise made by the debtor and his counsel was rigidly adhered to. The moving affidavit further mis-tates the fact when it claims that counsel for the debtor agreed to produce the debtor. We never gave such an assurance.

[fols. 162-172] The blanket charge made by the judgment creditor that the judgment debtor is transferring valuable assets to his wife is unsupported by any facts.

The judgment creditor concedes that,

"the alternative relief sought in this action with respect to an increase in the amount of the bond and the requirement of an immediate hearing of the appeal * * * are matters in the discretion of the Court."

Since the judgment creditor comes before this Court pleading for the exercise of its discretion, it is respectfully urged that such discretion should be exercised in an effort to afford the judgment debtor and his counsel a reasonable time in which to present to this Court adequately the law respecting basic jurisdictional problems.

There is annexed hereto as Exhibit B a copy of an affidavit dated January 28, 1936, made by Mr. Fox and submitted the Court below. This affidavit adequately describes the physical inability of Mr. Fox to proceed with any examination.

It is respectfully submitted, therefore, that the motion of the judgment creditor should in all respects be denied.

Daniel G. Rosenblatt.

Sworn to before me this 2nd day of March, 1936.
Edward W. Brandriss, Notary Public, Bronx County.

[fol. 173] In United States Circuit Court of Appeals, Second Circuit

Present: Honorable Martin T. Manton, Honorable Augustus N. Hand, Honorable Harrie B. Chase, Circuit Judges.

In the Matter of Supplementary Proceedings of Capital Company, a California Corporation, Judgment-Creditor, Appellee,

against

William Fox, Judgment-Debtor, Appellant

Order Dismissing Appeal—March 5, 1936

A motion having been made herein by counsel for the appellee for an order dismissing the appeal allowed herein by order of Hon. Martin T. Manton, dated February 20, 1936, from two orders, respectively dated December 19, 1935 and February 7, 1936, and respectively entered in the United States District Court for the Southern District of New York on December 20, 1935, and on February 20, 1936, and to vacate the supersedeas granted in said order dated February 20, 1936, or for other alternative relief,

and said motion having come on to be heard before this Court on the 2nd day of March, 1936, and after hearing counsel for the respective parties;

[fol. 174] Upon consideration thereof, it is

Ordered that said motion be and hereby is granted and said appeal be and hereby is dismissed and it is

Further ordered that the supersedeas contained in said order dated February 20, 1936, be and hereby is in all respects vacated and set aside.

Martin T. Manton, U. S. C. J. Augustus N. Hand, U. S. C. J.

O. K. J. A. C.

[fol. 175] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 176] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the record to be printed for the Supreme Court of the United States on the petition for a writ of certiorari to be filed therein, shall omit the following, which now constitute part of the records certified by the United States District Court for the Southern District of New York, and the United States Circuit Court of Appeals for the Second Circuit:

(1) Exhibit C, (copy of the subpoena dated September 28, 1935) annexed to the affidavit of Daniel G. Rosenblatt, sworn to November 20, 1935.

(2) Exhibit A, (order of Bondy, J., dated December 19, 1935) annexed to the affidavit of Samuel B. Stewart, Jr., sworn to January 2, 1936.

(3) Exhibit A, (order of the Circuit Court of Appeals, dated January 20, 1936) annexed to the affidavit of Samuel B. Stewart, Jr., dated February 3, 1936.

(4) Page 7, lines 2 to end of paragraph in affidavit of Samuel B. Stewart, Jr., sworn to February 27, 1936.

(5) Exhibit A, (order of Bondy, J., dated December 19, 1935) and Exhibit B, (order of Bondy, J., dated February

7, 1936) annexed to affidavit of Samuel B. Stewart, Jr., dated February 27, 1936.

[fol. 177] (6) Page 8, last two lines and page 9, first two lines in affidavit of Daniel G. Rosenblatt, sworn to March 2, 1936.

(7) Exhibit A, (affidavit of Mr. Tegtmeier) annexed to affidavit of Daniel G. Rosenblatt, sworn to March 2, 1936.

(8) Exhibit B, (affidavit of William Fox) annexed to affidavit of Daniel G Rosenblatt, sworn to March 2, 1936.

(9) Affidavit of Murry C. Becker, sworn to February 29, 1936.

(10) Affidavit of Samuel B. Stewart, Jr., sworn to March 3, 1936.

Dated New York, March 13th, 1936.

Cravath, de Gersdorff, Swaine & Wood, Attorneys for Respondent. Hirsh, Newman, Reass & Becker, Attorneys for Petitioner, Appearing Specially Herein.

[fol. 178] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 18, 1936

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

A writ of certiorari is granted to review the order of the United States Circuit Court of Appeals for the Second Circuit of March 5, 1936, dismissing the appeal from the order of the United States District Court for the Southern District of New York, entered on February 20, 1936, limited to the question of the jurisdiction of the Circuit Court of Appeals.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Nos. [redacted]

WILLIAM FOX, Petitioner,

vs.

CAPITAL COMPANY, a California corporation,

PETITION FOR WRITS OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BENJAMIN REASS,
Counsel for Petitioner.

HIRSH, NEWMAN, REASS & BECKER,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1935.

Nos. and

WILLIAM FOX, Petitioner,

vs.

CAPITAL COMPANY, a California corporation.

PETITION FOR WRITS OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of William Fox respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

A judgment in the sum of $297,412.91 was entered by confession in favor of the judgment-creditor and against the petitioner in the United States District Court for the Southern District of New York on July 18, 1935. On September 28, 1935, a subpoena in proceedings supplementary to judgment (R. 1), pursuant to Act of Congress June 1 1872, Ch. 255, Sec. 6, 17 Stat. 197 (R. S. Sec. 916, 28 U. S. C. Sec. 727), Common Law Rule 5 of the United

States District Court for the Southern District of New York (as set forth in the Appendix, infra, p. 22), and Article 45 of the Civil Practice Act of the State of New York (L. 1920, Ch. 925, as amended by L. 1935, Ch. 630, in effect September 1, 1935), was issued. On October 8, 1935, the aforesaid subpoena was served upon the petitioner on a railroad train at Frankfort Junction, in the State of Pennsylvania (R. 2), directing his appearance for examination at the courthouse of the United States District Court for the Southern District of New York on a day certain. The petitioner did not appear pursuant to that subpoena (R. 5). Thereafter, the judgment-creditor moved to punish the petitioner for contempt, for failure to appear pursuant to the aforesaid subpoena, by order to show cause served upon the petitioner at the Hotel Claridge, in Atlantic City, New Jersey, and returnable to the United States District Court for the Southern District of New York (R. 3-5). The petitioner, appearing specially in the said District Court, contended that the United States District Court for the Southern District of New York did not acquire any jurisdiction over him by reason of the service of the subpoena in the State of Pennsylvania, since the subpoena constitutes the original process commencing the proceedings known as "Proceedings Supplementary to Judgment"; that, therefore, the subpoena and the service thereof were void. The petitioner, therefore, further contended that he should not be punished for the violation of a void subpoena. On December 2, 1935, a decision was rendered upon this motion by Bondy, D. J. (R. 6), as follows:

> "The proceedings supplementary to execution (pursuant to Common Law Rule 5 of this Court) were ancillary to the original action in this Court. See Sherman Bank v. Schubert Theatrical Co., 238 Fed. 225, 228; they therefore could be instituted by the service of a subpoena outside of the territorial limits of this district. See Lerman v. Krenther-Arnold Hinge Last Co., 284 U. S. 448; 3 Cyc. of Fed. Proc. Sec. 750, and the order to show cause why the defendant should not be punished for con-

tempt could likewise be served beyond the territorial limits of this district. See Lerman case, supra.

Motion is therefore granted with leave to defendant to purge himself of the contempt by submission to examination. Settle order on notice.

WM. BONDY,
U. S. D. J.

Dec. 2, 1935."

An order was made on December 19, 1935, and entered December 20, 1935, in the United States District Court for the Southern District of New York (R. 27-30), holding that the subpoena had properly been served and further holding the judgment-debtor (petitioner) in contempt. This order provided that the petitioner might purge himself of the contempt by appearing for examination on or before a day certain, and in the interim provided that the question of punishment for the aforesaid contempt would be held in abeyance. The petitioner then filed a petition for appeal to the Circuit Court of Appeals for the Second Circuit, from the order of December 19, 1935 (R. 30). Thereupon an order was made by a Judge of the United States Circuit Court of Appeals for the Second Circuit allowing an appeal from the said order of December 19, 1935. The judgment-creditor moved to dismiss the appeal on the ground that the order of December 19, 1935, was not a final order, and, therefore, not appealable (R. 61). The Circuit Court of Appeals, by order dated January 20, 1936, dismissed the appeal, without opinion (R. 80). Thereupon a further order was made by the United States District Court for the Southern District of New York, under date of February 7, 1936, and entered February 20, 1936 (R. 54-56), imposing the following punishment on the petitioner:

(a) A fine in the sum of $235,082.03, representing the balance alleged to be due and unpaid on account of the judgment;

(b) Directing the petitioner to pay to the attorneys for the judgment-creditor the sum of $10,000 as and for their costs; and

(c) Directing the issuance of a warrant to a marshal forthwith to arrest and imprison the petitioner until he shall have paid the said costs of $10,000 *and* have paid the fine of $235,082.03 or submitted to examination.

An order was then made by a Judge of the United States Circuit Court of Appeals for the Second Circuit allowing an appeal from the said orders of February 7, 1936, and December 19, 1935, to the Circuit Court of Appeals for the Second Circuit (R. 59). A motion was thereupon made by the judgment-creditor to dismiss the appeal on the ground that the said orders of February 7, 1936, and December 19, 1935, were not final orders and hence not appealable (R. 81). The Circuit Court of Appeals for the Second Circuit, by order dated March 5, 1936 (R. 95), dismissed the said appeal without opinion.

B.

Reasons Relied On for the Allowance of the Writs.

1. The decision of the United States District Court for the Southern District of New York and the refusal of the Circuit Court of Appeals for the Second Circuit to review the determination of the District Court will deprive the petitioner of a review of the important question of jurisdiction, unless this Court will grant a review.

2. The decision of the District Court assumed jurisdiction in total disregard of the fact that the process instituting the proceedings known as "Supplementary Proceedings" was not served within the territorial limits of the United States District Court for the Southern District of New York, as required by law.

3. The District Court has decided a question of Federal jurisdiction of vital importance, which has never been

settled directly, either by the Circuit Court of Appeals of any Circuit or by this Court, and which should be settled by this Court.

4. The United States Circuit Court of Appeals for the Second Circuit has so strictly construed the extent of the appealability of the orders of the District Court, as to deprive the petitioner of a review of the order of the District Court, involving a very substantial right, and has thus sanctioned a departure by the District Court from express jurisdictional limitations.

5. The United States Circuit Court of Appeals for the Second Circuit has decided an important question of law regarding its appellate jurisdiction in a manner which is untenable.

6. The United States Circuit Court of Appeals for the Second Circuit has so strictly construed the extent of its appellate jurisdiction in express violation of the intent and purpose of appellate courts, which determination has not yet been but should be settled by this Court.

7. The result of these acts by the Circuit Court of Appeals and the District Court will be to deprive the petitioner of his liberty and his property in violation of his constitutional rights and without due process of law.

C.

Prayer for the Writs.

WHEREFORE, it is respectfully submitted that the writs of certiorari should be granted.

WILLIAM FOX, Petitioner,
By BENJAMIN REASS,
Counsel for Petitioner.

April 6, 1936.

Supreme Court of the United States

OCTOBER TERM, 1935.

Nos. and

WILLIAM FOX, Petitioner,

vs.

CAPITAL COMPANY, a California corporation.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I

The Opinions of the Courts Below.

The opinion of the District Court for the Southern District of New York has not yet been officially reported. It was made by BONDY, D. J., a Judge of the United States District Court for the Southern District of New York, under date of December 2, 1935 (R. 6). No opinions were written by the United States Circuit Court of Appeals for the Second Circuit in dismissing the appeal from the order of December 19, 1935, and in the subsequent dismissal of the appeal from the orders of December 19, 1935, and February 7, 1936.

II

Jurisdiction of This Court.

1. The jurisdiction of this Court is based upon Judicial Code, Sec. 240 (a) (28 U. S. C. Sec. 347 [a]), as amended by Act of Congress February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938.

2. The orders of the District Court to be reviewed are dated December 19, 1935, and February 7, 1936, and the orders of the United States Circuit Court of Appeals for the Second Circuit to be reviewed are dated January 20, 1936, and March 5, 1936.

III

Statement of the Case.

The essential facts of the case are stated in the foregoing petition, and in the interest of brevity are not repeated here.

IV

Specification of Errors.

The United States District Court for the Southern District of New York erred:

1. In granting the motion of the judgment-creditor to punish the judgment-debtor as and for a civil contempt of this Court.

2. In failing to deny the said motion to punish the judgment-debtor as and for a civil contempt of this Court.

3. In refusing to find that process to commence an action or special proceeding must be served on the defendant or judgment-debtor, as the case may be, within the territorial limits of the United States District Court for the Southern District of New York.

4. In refusing to find that the subpoena in supplementary proceedings constituted the process which commences that special and independent proceeding known as "Proceedings Supplementary to Judgment", as defined by Section 916 of the Revised Statutes (28 U. S. C. Sec. 727), Common Law Rule 5 of the United States District Court for the Southern District of New York, and Article 45 of the Civil Practice Act of the State of New York.

5. In refusing to find that failure to obey a void process does not constitute a civil contempt of court.

6. In refusing to find that the Act of Congress March 2, 1793, Ch. 22, Sec. 6, 1 Stat. 335, as amended March 4, 1925, Ch. 526, Sec. 2, 43 Stat. 1265 (R. S. Sec. 876, 28 U. S. C. Sec. 654), providing for the service of a subpoena within one hundred miles from the courthouse, refers only to witnesses in a proceeding which is pending and which was validly instituted and cannot be the basis of instituting an action or special proceeding, and in refusing to find that the said Section 876 of the Revised Statutes (28 U. S. C. Sec. 654) is not applicable to the instant proceedings.

7. In depriving the petitioner of his liberty and his property without due process of law, contrary to the Fifth Amendment of the Constitution of the United States.

8. In making the order dated December 19, 1935, filed in said Court on December 20, 1935.

9. In making the order dated February 7, 1936, and filed in said Court on February 20, 1936.

10. In fining the judgment-debtor the amount alleged to be due and unpaid on account of the judgment herein.

11. In directing the judgment-debtor to pay the attorneys for the judgment-creditor the sum of $10,000 as and for the costs of this proceeding.

The United States Circuit Court of Appeals for the Second Circuit erred:

1. In holding that the order of December 19, 1935, was not a final order and hence not appealable.

2. In holding that the order of February 7, 1936, was not a final order and hence not appealable.

ARGUMENT.

Summary of Argument.

POINT A

The jurisdiction of the United States District Court for the Southern District of New York is expressly defined by congressional statute. Service of process to commence an action or special proceeding must be effected within its territorial limits.

POINT B

Supplementary proceedings are special proceedings, independent of the original action in which the judgment was obtained. The subpoena to commence that special proceeding can only be served within the territorial limits of the Southern District of New York. The service made in Philadelphia, Pennsylvania, was void.

POINT C

The failure to obey a void process does not constitute a contempt.

Point D

The order of December 19, 1935, entered in the United States District Court for the Southern District of New York on December 20, 1935, and supplemented by the order of February 7, 1936, and entered February 20, 1936, constitute appealable orders.

POINT A

The jurisdiction of the United States District Court for the Southern District of New York is expressly defined by congressional statute. Service of process to commence an action or special proceeding must be effected within its territorial limits.

The rule is firmly established that the process of a District Court cannot run beyond the physical limits of the jurisdiction and such process must be served upon the person to whom it is directed within that district. Judicial Code, Sec. 51 (28 U. S. C. Sec. 112), as amended March 4, 1925, Ch. 526, Sec. 1, 43 Stat. 1246; *Munter* v. *Weil Co.*, 261 U. S. 276; *Hughes Federal Practice,* Vol. 1, Secs. 243, 250.

Robertson v. *Labor Board,* 268 U. S. 619, 622, states the jurisdictional limitations of the District Court as follows:

> "Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district, *Harkness* v. *Hyde,* 98 U. S. 476; *Ex parte Graham,* 3 Wash. 456; and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. *Toland* v. *Sprague,* 12 Pet. 300, 330."

It is of course a fact that the entire State of Pennsylvania is outside of the geographic limits of the United States District Court for the Southern District of New York.

POINT B

"Proceedings supplementary to judgment" are special proceedings, independent of the original action in which the judgment was obtained. The subpoena served upon the petitioner to commence that special proceeding constituted the process which can be served only within the territorial limits of the United States District Court for the Southern District of New York. Service made in the State of Pennsylvania was, therefore, void.

"Proceedings supplementary to judgment" are statutory proceedings authorized by Article 45 of the Civil Practice Act of the State of New York (hereinafter sometimes referred to as "C. P. A."). Common Law Rule 5 of the United States District Court of the Southern District of New York, pursuant to R. S. Sec. 916 (28 U. S. C. Sec. 727), adopts and makes Article 45 of the C. P. A. part of the Federal practice. Thus, Article 45 of the C. P. A. and interpretations thereof by the Courts of the State of New York constitute the law of the United States District Court for the Southern District of New York, to the same extent as if Congress itself had expressly passed that legislation. *Fink* v. *O'Neill*, 106 U. S. 272, 276; *Custer* v. *McCutcheon*, 283 U. S. 514, 516. The District Court thus having adopted the State law must adopt it in toto and cannot alter it in any respect. *McCracken* v. *Hayward*, 43 U. S. 608.

The rule is clearly defined in *Ex Parte Boyd*, 105 U. S. 647, 652, thus:

> "It is the settled doctrine of this court, as established and explained by these authorities, that the power of Congress, under the Constitution, as well as that of the courts of the United States, acting under its authority, extends to the adoption of the laws of the several states, not only as to the nature

> and form of writs of execution for the enforcement of judgment, but also as to *all proceedings thereupon.*" (Italics the Court's.)

Amy v. *Watertown*, 130 U. S. 301, confirms the rule that the District Court for the Southern District of New York is definitely bound to follow the New York State practice, with reference to supplementary proceedings, and requires that the subpoena which institutes supplementary proceedings must be served in the same manner as the State statute provides for service in a State court proceeding. In that case this Court held:

> "But the statute of 1872 is peremptory, and whatever belongs to the three categories of practice, pleading and forms and modes of proceedings, *must* conform to the state law, and the practice of the state courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the act of Congress is to be followed in preference to the laws of the State. With regard to the mode of serving mesne process upon corporations and other persons, Congress has not laid down any rule; *and hence the state law and practice must be followed. There can be no doubt, we think, that the mode of service of process is within the categories named in the act. It is part of the practice and mode of proceeding in a suit*" (p. 304). (Italics ours.)
>
> * * * * * *
>
> "Here we are bound by statute; and not by the state statute alone, but by the Act of Congress, which obliges us to follow the state statute and state practice. *The Federal Courts are bound hand and foot, and are compelled and obliged by the Federal legislature to obey the state law;* and according to this law the judgment of the Circuit Court was correct and is, therefore, *affirmed*" (p. 320). (Italics ours.)

There remains thus to inquire as to the applicable New York law. Section 773 of the C. P. A. defines supplementary proceedings as special proceedings (see Appendix,

infra, p. 22). *Meyers* v. *Consolidated Ice Co.*, 196 N. Y. 471, 473. In *Harris* v. *Weiss* (not officially reported), 105 N. Y. Supp. 8, 9, is found a detailed statement by the commissioners who drafted the statutory provisions now contained in Article 45 of the C. P. A. to the effect that supplementary proceedings and the code provisions were intended to and did set up *supplementary proceedings as separate, independent and original proceedings.*

The Court wherein the judgment was obtained does not, therefore, retain any jurisdiction over the person of the defendant for the purpose of supplementary proceedings by reason of the original service of the summons in the action. A new and independent process must be served in the same manner and to the same extent as a summons in an action in order properly to institute the supplementary proceedings. *Rosen* v. *Polansky,* 121 N. Y. Misc. 395.

A special proceeding is distinguished from an action by Section 46-a of the New York General Construction Law (Cons. Laws, Ch. 22, 1920):

> "Every prosecution by a party against another party in a court of justice which is not an action is a special proceeding."

Section 218 of the Civil Practice Act provides:

> *"A civil action is commenced by the service of a summons,* which is a mandate of the court. Rules may be made respecting the requisites and form of a summons and notice and endorsements thereon." (Italics ours.)

Section 403 of the Civil Practice Act defines a subpoena as a legal process (as set forth in the Appendix, infra, p. 24).

Rule 21 of the New York Rules of Civil Practice (adopted pursuant to L. 1920, Ch. 902, as amended by L. 1921, Ch. 370), entitled *"Manner of Service of Papers to Begin a Proceeding"* provides:

> *"The provisions of the statutes and rule relating to the mode of personal service of a summons shall*

> *apply to the service of any process or other paper whereby a proceeding is begun in a court,* or before an officer, except a proceeding to punish for contempt, unless other special provision for the service thereof is made by law or rule. Other papers in a proceeding shall be served in like manner as in an action." (Italics ours.)

Section 225 of the Civil Practice Act reads as follows:

> "Personal service of the summons upon the defendant being a natural person must be made by delivering a copy thereof *within the state* as follows: * * * to the defendant in person." (Italics ours.)

For further elucidation as to the proper institution of a special proceeding, see *Hill* v. *Hill,* 124 N. Y. Misc. 102, in which the Court held:

> "This is a special proceeding. * * * Service upon the various parties herein has been made in the manner provided for the personal service of a summons. The court, therefore, has acquired jurisdiction of the parties" (124 Misc. 102, 105).

It follows, therefore, that the subpoena which sought to commence the special proceeding entitled "Proceedings Supplementary to Judgment" is required to be served within the jurisdiction of the Court in the same manner, exactly, as a summons in an action.

The District Court below obviously overlooked the applicable New York statutes and authorities when it held that the "proceedings supplementary to execution (pursuant to Common Law Rule 5 of this Court) were ancillary to the original action in this Court" (R. 6).

The case cited by Judge Bondy in his opinion (R. 6) *as to the nature of supplementary proceedings has not the slightest relevancy to that matter.* The District Court was obviously confused by the fact that creditor's bills in equity which are proceedings *in rem* are considered ancillary proceedings. Though statutory supplementary proceedings are now used to a great extent in lieu of

creditor's bills, nevertheless, the nature of statutory supplementary proceedings is derived exclusively from the statutes which provide for supplementary proceedings.

It cannot be said that supplementary proceedings superseded the old creditor's bill, since the creditor's right to proceed by action was not taken away by the statutes authorizing supplementary proceedings and the two remedies still co-exist. *Carmody's N. Y. Practice,* Vol. 5, Ch. 34.

While the Court may have jurisdiction in rem upon the judgment and thus may define the creditor's bill as an ancillary proceeding, the same rules cannot apply to supplementary proceedings which are definitely proceedings in personam, where jurisdiction over the person of the debtor must be acquired by due service of process. (*Munter* v. *Weil Co.,* 261 U. S. 276.)

Matter of Maltbie v. *Lobsitz Mills Co.,* 223 N. Y. 227, 232, 234, expressly defines supplementary proceedings as "proceedings *in personam*", and "being a summary proceeding created by statute and in derogation of the common law, must be strictly construed" and which "cannot be enlarged by construction nor by law available or valid, except by strictly following the directions of the act."

It appears, therefore, that the service of the subpoena or process instituting supplementary proceedings herein which was effected near Philadelphia, in the State of Pennsylvania, and outside of the territorial jurisdiction of the United States District Court for the Southern District of New York, was void, and, therefore, a nullity.

R. S. Sec. 876 (28 U. S. C. Sec. 654) which provides for service of subpoena upon witnesses within a hundred miles of the holding of Court does not apply here because by its very terms this statute applies to a "witness" in a pending proceeding. There was no pending proceeding at the time of the service of the subpoena on the petitioner, for it is the service of this very subpoena

upon the petitioner *as a party* which is relied upon as the process instituting the proceeding. Furthermore, R. S. Sec. 876 (28 U. S. C. Sec. 654) provides for service upon a witness who lives within a hundred miles of the courthouse. Although the word "lives" has been interpreted to include place of temporary sojourn, it has never been extended to include a situation, as here, where service was effected upon a railroad train (R. 2) where the very act of traveling demonstrates that the place of service was not a place of sojourn.

POINT C

The failure to obey a void process does not constitute contempt.

Service of the subpoena upon the petitioner outside of the jurisdictional limits of the District Court was a nullity. Disobedience of a void subpoena or mandate does not constitute contempt.

Beauchamp v. *United States,* 76 Fed. (2d) 663, summarizes the rule as follows:

> "In order that disobedience of this injunction order may constitute contempt, it is necessary that the order be valid. Disobedience of a void mandate, order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt.
>
> When '* * * a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. * * *' Ex parte Fiske, 113 U. S. 713, 5 Sup. Ct. 724, 726, 28 L. Ed. 1117; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, L. Ed. 216." 76 Fed. (2d) 663, 668.

The authorities of the State of New York are in accord. In *Matter of Hollingshead Co.* v. *Santillo,* 121 N. Y. Misc. 200, the Court ruled:

> "I hold, therefore, that the original order for the judgment debtor's examination was void, and the debtor was not in contempt for disobeying it. Motion [to punish] denied" (p. 202).

POINT D

The orders of the District Court dated December 19, 1935, and February 7, 1936, constitute final orders appealable to the Circuit Court of Appeals for the Second Circuit. The Circuit Court of Appeals erred in dismissing the appeals.

These orders of the District Court not only punished the petitioner for contempt, but fixed the punishment as follows: (a) it directs that the petitioner be fined in the sum of $235,082.03, the amount alleged to be due and unpaid on account of the judgment, which fine can be avoided by the submission of the petitioner to examination; (b) it directs that the petitioner pay to the attorneys for the judgment-creditor the sum of $10,000, *which amount must be paid except upon the forfeiture by the petitioner of his liberty,* and (c) directs that the petitioner be imprisoned until he pays the fine or submits to examination and, in addition, pays the said sum of $10,000.

The Conformity Acts of Congress, Act of Cong. June 1, 1872, Ch. 255, Secs. 5, 6, 17 Stat. 197 (R. S. Secs. 914, 916, 28 U. S. C. Secs. 724, 727), have no application whatsoever to the appellate jurisdiction of the Circuit Court of Appeals. By express provision of the Conformity Acts (R. S. Secs. 914, 916 [28 U. S. C. A. Secs. 724, 727]), conformity is limited to proceedings in the District Courts. Hence, any limitations or restrictions on the appellate jurisdiction of the New York Court of Appeals have no binding effect or persuasive force in determining the appel-

late jurisdiction of the Circuit Court of Appeals, the contrary having been contended in the Circuit Court of Appeals by the judgment-creditor. The appellate practice in the Circuit Court of Appeals is defined in Chapter 6 of the Judicial Code (Title 28, U. S. C.).

Act of Cong. March 3, 1891, Ch. 517, Sec. 6, 26 Stat. 828, as amended February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 936 (Judicial Code Sec. 128, 28 U. S. C. Sec. 225), defines the appellate jurisdiction of the Circuit Court of Appeals as follows:

> "(a) Review of Final Decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error *final decisions.* • • •" (Italics ours.)

In the case of *Odell* v. *H. Batterman & Co.,* 223 Fed. 292, it is held that:

> "Under the decisions an adjudication is a final appealable order if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal" (p. 295).

In *Chief Consol. Min. Co.* v. *Mammoth Min. Co.,* 29 Fed. (2d) 703, the Court held:

> "A final order is one which determines a substantial right against a party in such a manner as leaves him no adequate relief except by appeal.
>
> Odell v. Batterman Co. (C. C. A. 2), 223 F. 292; American Brake Shoe and Foundry Co. v. New York Rys. Co. (C. C. A. 2), 282 F. 523.
>
> *And this is true irrespective of final decree in the main litigation.* (Citing cases.)" (p. 705). (Italics ours.)

In *Amer. Brake Shoe & Foundry Co.* v. *N. Y. Rys. Co.,* 282 Fed. 523, at pages 527, 528, the Court stated:

> "An adjudication is a final appealable order, if it involves a determination of a substantial right against a party in such a manner as leaves him no

> adequate relief, except by recourse to an appeal. [Citing Odell case.] *If the petitioners have a right of immediate payment, the orders must be regarded as a determination and denial of a substantial right, and which leaves no adequate relief, except by recourse to an appeal. As such we have a right to review them.*" (Italics ours.)

In *Rector* v. *United States,* 20 Fed. (2d) 845, 872, the Court stated:

> "• • • It is certain that an *order is final and appealable if it is of a character which settles substantial rights; which makes no reservation as to its effect; which is designed to be operative in a way affecting such rights at once or before or irrespective of the final decree in the main litigation.* With this conception of finality in mind, we proceed to test thereby these orders reducing royalties." (Italics ours.)

Apparently, the Circuit Court of Appeals was confused as to the meaning and significance of the term, "final decisions", as a limitation upon its appellate jurisdiction. There is no requirement that the decree or order from which the appeal is taken must finally determine the action or special proceeding as is required for the appellate jurisdiction of the New York Court of Appeals. We note in our case that not only are the orders of the District Court, dated December 19, 1935, and February 7, 1936, determinations by the District Court of a substantial right against the petitioner, but the further fact stands uncontradicted that there are no means by which the petitioner may avoid the payment to the attorneys for the judgment-creditor of the sum of $10,000. That is an irrevocable decree, which cannot be satisfied except by the payment of that sum. It may well be asked what further act is required or what further order or decree can be made, which will constitute a final determination or a final decision? The petitioner has been adjudged in contempt, he has been fined a substantial sum, equal to the amount alleged to be due and

unpaid on account of the judgment, although it appears on the record (R. 74, 75) and it is now being contested in the State of New Jersey that this judgment has been more than fully paid. The petitioner has furthermore been directed to pay the sum of $10,000 and to be incarcerated until he does so.

There is nothing further for the judgment-creditor to do. There is no further order of the District Court to be issued.

These supplementary proceedings are special proceedings in which no judgment or decree can be entered. Under the interpretation given by the judgment-creditor and, apparently, followed by the Circuit Court of Appeals, nothing will ever be final with respect to the rights of the petitioner, unless and until these proceedings come to an end, which, under the laws of the State of New York, may never eventuate.

The judgment-creditor relied in the Circuit Court of Appeals upon the decision of this Court in the case of *Doyle* v. *London Guarantee & Accident Co., Ltd.*, 204 U. S. 599. There, a party to the action was directed to produce certain books and records before trial.

Thus the direction to produce the books was made prior to the entry of judgment in the action and in order to enable the party seeking the books to prepare the case for trial. The failure to produce the books resulted in an order adjudging the said party in contempt and further directed a fine in the sum of $250, which could have been avoided by the delivery of the books requested. Furthermore, no question of the jurisdiction of the Court to direct the production of the books was put in issue.

Therefore, the differences between the holding in the *Doyle* case and the determination of the Circuit Court of Appeals at bar are threefold:

(1) In the *Doyle* case, leave to purge was given; in this case, the requirement for the payment of $10,000 to counsel for the judgment-creditor is final and no leave to purge is granted.

(2) In the *Doyle* case, the order was preliminary to a hearing in which a final judgment would be entered from which an appeal would lie bringing up for appellate review the contempt order; in this case, no final judgment, no final decree, and no other final disposition or determination will ensue.

(3) In the *Doyle* case, no issue was made respecting the jurisdiction of the Court which made the order directing the production of the books; in this case, the question of jurisdiction is paramount.

The denial of a right to appeal from the contempt order in the *Doyle* case meant only the postponement of the right to appeal on the part of the aggrieved party, whereas in our case, the refusal of the Circuit Court of Appeals to entertain the appeals from the orders of December 19, 1935, and February 7, 1936, constitutes a final and permanent refusal to review the orders of the District Court.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise of this Court's supervisory powers in order that vital questions of Federal law may be settled, as hereinabove discussed, and that to such an end writs of certiorari should be granted and this Court should review the determinations of the Courts below and finally reverse them.

Respectfully submitted,

BENJAMIN REASS,
Counsel for Petitioner.

HIRSH, NEWMAN, REASS & BECKER,
of Counsel.

APPENDIX.

Common Law Rule 5 of the United States District Court for the Southern District of New York provides as follows:

> "In Common Law causes the parties shall be entitled to the same rights and remedies as respects attachments against the property of the defendant, and as respects, proceedings supplementary to execution, as are now or may be hereafter provided by the laws of the State of New York, which laws (in respect of Common Law causes) are hereby adopted."

The applicable sections of **Article 45 of the New York Civil Practice Act,** entitled "Proceedings Supplementary to Judgment" (Sections 773 through 810), are as follows:

> "§ 773. IN WHAT CASES JUDGMENT CREDITOR MAY MAINTAIN PROCEEDINGS. To entitle a judgment creditor to maintain a special proceeding authorized by this article, the judgment must have been rendered in any sum by any court of this state, whether or not of record. A decree or order awarding the payment of money shall be deemed a judgment for the purpose of this article. A proceeding may be maintained until such judgment is satisfied, vacated or barred by the statute of limitations. [Added by L. 1935, ch. 630, in effect Sept. 1; see old § 775.]"

> "§ 774. HOW PROCEEDINGS MAY BE INSTITUTED. Proceedings under this article may be instituted:
>
> 1. By order of the court.
>
> 2. By subpoena of the judgment creditor's attorney, served upon the judgment debtor, a third party or a witness.
>
> 3. By warrant issued as in this article provided.
>
> Such order or subpoena shall require the attendance of the judgment debtor or third party or witness, to whom it is directed, to appear for examina-

tion at a time and place to be specified therein, concerning the property of the judgment debtor. Examinations of the debtor, third party and witnesses may be had simultaneously or separately, and the close of one or more of such examinations shall not affect the proceedings not concluded. [Added by L. 1935, ch. 630, in effect Sept. 1; see old §§ 773, 774.]"

"§ 783. MANNER OF SERVICE OF ORDERS, SUBPOENAS AND WARRANTS.

1. An injunction order, or an order or a subpoena requiring a person to attend and be examined, made as prescribed in this article, must be served by delivering to and leaving with the person named therein, a copy thereof, together with a copy of the affidavit, if any, upon which such order was granted. Service upon a corporation is sufficient if made in the same manner as a summons may be served upon such corporation unless the officer or agent is specifically designated in the subpoena or order, in which case service shall be made upon him. * * *

2. * * * [Added by L. 1935, ch. 630, in effect Sept. 1, from old Sections 798, 799.]"

The sections applicable to the service of process in this proceedings are found in the **New York Civil Practice Act** (L. 1920, Ch. 925), as follows:

"§ 218. SUMMONS GENERALLY. A civil action is commenced by the service of a summons, which is a mandate of the court. Rules may be made respecting the requisites and form of a summons and notice and endorsements thereon."

"§225. PERSONAL SERVICE OF SUMMONS UPON A NATURAL PERSON. Personal service of the summons upon a defendant being a natural person must be made by delivering a copy thereof within the state as follows:

1. * * *

2. * * *

3. In any other case, to the defendant in person."

> "§ 403. ISSUANCE OF SUBPOENA. A subpoena is a process in the name of the court, referee, body or other person authorized by law to issue the same, requiring the attendance of a witness at the trial or hearing of a cause or the hearing of a motion or before a referee or other person where proof or the production of books, papers or other documents is required."

A special proceeding is defined in the **New York General Construction Law** (Cons. Laws, Ch. 22, 1909, as amended by L. 1920, Ch. 917) as follows:

> "§ 46-a. SPECIAL PROCEEDING. Every prosecution by a party against another party in a court of justice which is not an action is a special proceeding."

The **New York Rules of Civil Practice** (adopted pursuant to L. 1920, Ch. 902, as amended by L. 1921, Ch. 370) applicable in this proceeding reads:

> "Rule 21. MANNER OF SERVICE OF PAPERS TO BEGIN A PROCEEDING. The provisions of the statutes and rules relating to the mode of personal service of a summons shall apply to the service of any process or other paper whereby a proceeding is begun in a court, or before an officer, except a proceeding to punish for contempt, unless other special provision for the service thereof is made by law or rule. Other papers in a proceeding shall be served in like manner as in an action."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 23.

WILLIAM FOX,

Petitioner,

vs.

CAPITAL COMPANY, a California corporation,

Respondent.

BRIEF OF PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 23.

WILLIAM FOX,

Petitioner,

vs.

CAPITAL COMPANY, a California corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONER.

I.

Opinions Below.

The opinion of the District Court for the Southern District of New York has not been officially reported. It was rendered by Bondy, *D. J.*, a Judge of the United States District Court for the Southern District of New York, under date of December 2, 1935 (R. 6). No opinion was written by the United States Circuit Court of Appeals for the Second Circuit in dismissing the appeal from the orders of December 19, 1935, and February 7, 1936.

II.

Jurisdiction of This Court.

1. The jurisdiction of this Court is based upon Judicial Code, Sec. 240 (a) (28 U. S. C., Sec. 347 [a]), as amended by Act of Congress February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938. The petition for certiorari was filed April 6, 1936 and the writ was granted May 18, 1936 (R. 97).

2. The order to be reviewed is an order of the United States Circuit Court of Appeals for the Second Circuit, dated March 5, 1936 (R. 95-96), which dismissed an appeal from two orders of the United States District Court for the Southern District of New York, respectively dated December 19, 1935 (R. 27-30) and February 7, 1936 (R. 54-56).

III.

Statement of the Case.

A judgment in the sum of $297,412.91 was entered by confession in favor of the respondent and against the petitioner in the United States District Court for the Southern District of New York on July 18, 1935. On September 28, 1935, a subpoena in proceedings supplementary to judgment (R. 1), pursuant to Act of Congress June 1, 1872, Ch. 255, Sec. 6, 17 Stat. 197 (R. S. Sec. 916, 28 U. S. C. Sec. 727), Common Law Rule 5 of the United States District Court for the Southern District of New York (as set forth in the Appendix, *infra,* p. 47), and Article 45 of the Civil Practice Act of the State of New

York (L. 1920, Ch. 925, as amended by L. 1935, Ch. 630, in effect September 1, 1935), was issued. On October 8, 1935, the aforesaid subpoena was served upon the petitioner on a railroad train at Frankfort Junction, in the State of Pennsylvania (R. 2), directing his appearance for examination at the courthouse of the United States District Court for the Southern District of New York on a day certain. The petitioner did not appear pursuant to that subpoena (R. 5). Thereafter, the respondent moved to punish the petitioner for contempt, for failure to appear pursuant to the aforesaid subpoena, by order to show cause served upon the petitioner at the Hotel Claridge, in Atlantic City, New Jersey, and returnable to the United States District Court for the Southern District of New York (R. 3-5). The petitioner, appearing specially in the said District Court, contended that the United States District Court for the Southern District of New York did not acquire any jurisdiction over him by reason of the service of the subpoena in the State of Pennsylvania, since the subpoena constitutes the original process commencing the proceedings known as "Proceedings Supplementary to Judgment"; that, therefore, the subpoena and the service thereof were void. The petitioner, therefore, further contended that he should not be punished for the violation of a void subpoena. On December 2, 1935, a decision was rendered upon this motion by Bondy, *D. J.* (R. 6), as follows:

> "The proceedings supplementary to execution (pursuant to Common Law Rule 5 of this Court) were ancillary to the original action in this Court. See *Sherman Bank* v. *Schubert Theatrical Co.*, 238 Fed. 225, 228; they therefore could be instituted by the service of a subpoena outside of

the territorial limits of this district. See *Lerman* v. *Krenther-Arnold Hinge Last Co.,* 284 U. S. 448; 3 Cyc. of Fed. Proc. Sec. 750, and the order to show cause why the defendant should not be punished for contempt could likewise be served beyond the territorial limits of this district. See *Lerman* case, *supra.*

Motion is therefore granted with leave to defendant to purge himself of the contempt by submission to examination. Settle order on notice.

WM. BONDY,
U. S. D. J.

Dec. 2, 1935."

An order was made on December 19, 1935, and entered December 20, 1935, in the United States District Court for the Southern District of New York (R. 27-30), holding that the subpoena had properly been served and further holding the petitioner in contempt. This order provided that the petitioner might purge himself of the contempt by appearing for examination on or before a day certain, and in the interim provided that the question of punishment for the aforesaid contempt would be held in abeyance. The petitioner then filed a petition for appeal to the Circuit Court of Appeals for the Second Circuit, from the order of December 19, 1935 (R. 30). Thereupon an order was made by a Judge of the United States Circuit Court of Appeals for the Second Circuit allowing an appeal from the said order of December 19, 1935 (R. 33). The respondent moved to dismiss the appeal on the ground that the order of December 19, 1935, was not a final order, and, therefore, not appealable (R. 61). The Circuit Court of Appeals, by order dated January 20, 1936, dismissed the appeal, without opinion (R. 80). Thereupon a further order was made by the

United States District Court for the Southern District of New York, under date of February 7, 1936, and entered February 20, 1936 (R. 54-56), imposing the following punishment on the petitioner:

(a) A fine in the sum of $235,082.03, representing the balance alleged to be due and unpaid on account of the judgment;

(b) Directing the petitioner to pay to the attorneys for the judgment-creditor the sum of $10,000 as and for their costs; and

(c) Directing the issuance of a warrant to a marshal forthwith to arrest and imprison the petitioner until he shall have paid the said costs of $10,000 *and* have paid the fine of $235,082.03 or submitted to examination.

An order was then made by a Judge of the United States Circuit Court of Appeals for the Second Circuit allowing an appeal from the said orders of December 19, 1935, and February 7, 1936, to the Circuit Court of Appeals for the Second Circuit (R. 59). A motion was thereupon made by the respondent to dismiss the appeal on the ground that the said orders of December 19, 1935, and February 7, 1936, were not final orders and hence not appealable (R. 81). The Circuit Court of Appeals for the Second Circuit, by order dated March 5, 1936 (R. 95), dismissed the said appeal without opinion.

IV.

Assignment of Error.

The United States Circuit Court of Appeals for the Second Circuit erred in holding that the order of

February 7, 1936, was not a final order and hence not appealable.

V.

Question Presented.

The single question before this Court is the jurisdiction of the Circuit Court of Appeals to review the aforementioned orders of the District Court.

VI.

Summary of Argument.

A.—**The orders of December 19, 1935 and February 7, 1936 constitute a final decision within the meaning of Section 128 of the Judicial Code, because they affected a substantial right of the petitioner in so far as they ordered the immediate payment of $10,000 to the attorneys for the respondent, from which order there can be no adequate relief except by an appeal at this time.**

B.—**The orders of the United States District Court for the Southern District of New York, dated December 19, 1935 and February 7, 1936, constitute a final decision because they order the immediate payment of money.**

C.—**In a case in which the District Court has neither jurisdiction nor power to make an order therein, a "final" order is to be found in the circumstances.**

D.—**The orders of the District Court, dated December 19, 1935, and February 7, 1936, punished this petitioner for contempt of court. In a similar**

case in which the contention that the District Court lacked jurisdiction was presented, the Circuit Court of Appeals reversed the order on the merits without questioning its finality.

E.—As the orders of the District Court, dated December 19, 1935, and February 7, 1936, are dual in nature, being final as to the $10,000 ordered paid to the respondent's attorneys, the Circuit Court of Appeals has jurisdiction to hear the appeal.

VII.

Argument.

POINT A.

The orders of December 19, 1935 and February 7, 1936 constitute a final decision within the meaning of Section 128 of the Judicial Code, because they affected a substantial right of the petitioner in so far as they ordered the immediate payment of $10,000 to the attorneys for the respondent, from which order there can be no adequate relief except by an appeal at this time.

In the brief in support of the petition for a writ of certiorari granted herein, emphasis was placed upon the fact that the orders of the United States District Court for the Southern District of New York, dated December 19, 1935 (R. 27-30) and February 7, 1936 (R. 54-56) not only adjudged the petitioner in contempt (R. 29), but also (1) directed the petitioner to pay a fine in the sum of $235,082.03, the amount alleged to be due and unpaid on account of the judgment (R. 55), which fine may be avoided by submission of the petitioner to examination (R. 56), and (2)

directed the petitioner to pay to the attorneys for the respondent herein, the sum of $10,000, as and for their costs in this proceeding (R. 56), *which amount must be paid except upon the forfeiture by the petitioner of his liberty* (R. 56), and (3) directed the petitioner be imprisoned until he pays the fine or submits to examination, and in addition, pays the aforesaid sum of $10,000 (R. 56).

It is the contention of the petitioner that the aforementioned orders of the United States District Court for the Southern District of New York constitute a final decision, within the meaning of the Act of Congress of March 3, 1891, Ch. 517, Sec. 6, 26 Stat. 828, as amended February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 936 (Judicial Code, Sec. 128, 28 U. S. C., Sec. 225) which defines the appellate jurisdiction of the Circuit Court of Appeals as follows:

> "(a) *Review of Final Decisions.* The circuit courts of appeal shall have appellate jurisdiction to review by appeal or by writ of error final decisions——
>
> "First. In the district courts * * *"

To clarify the issue at the outset, the order of the District Court, dated December 19, 1935, adjudging the petitioner in contempt (R. 27-30), provided that the punishment, costs and disbursements, if any, to be imposed were left open subject to being fixed by supplemental order of the Court (R. 30). The order of the District Court dated February 7, 1936 punishing the petitioner for contempt (R. 54-56) is the supplemental order previously provided for (R. 55). Thus the two orders are in reality a single order, judgment and decision, from which decision an order al-

lowing appeal was granted (R. 59). The order of the United States Circuit Court of Appeals for the Second Circuit, dated March 5, 1936 (R. 95-96), which is now under review by the order of this Court allowing Certiorari (R. 97), dismissed the appeal allowed by the order allowing said appeal (R. 59), reciting therein that the appeal had been allowed from the two orders, respectively dated December 19, 1935 and February 7, 1936 (R. 95). The writ of certiorari granted herein is limited to the single question of the jurisdiction of the Circuit Court of Appeals, and therefore, whether the orders of the District Court constitute a "final decision" is the sole problem now before this Court.

There have been numerous decisions defining appealable orders and the purpose of the rule limiting appeals to orders which are in whole or in some substantial part *final.* In the recent case of *Leonardi* v. *The Chase National Bank of the City of New York* (C. C. A. 2, 1936), 81 F. (2d) 19, the reason for the rule requiring finality is clearly stated by the Court, as follows:

> "* * * The purpose of the rule allowing no appeal from interlocutory orders is merely to prevent the case coming up piecemeal, not to cut off altogether appeals from certain types of orders" (p. 20).

The petitioner contends that an appeal from the orders of the District Court, dated December 19, 1935 and February 7, 1936 would not violate the rule as set forth in the *Leonardi* case, *supra.* The orders clearly determine that the petitioner is to pay to the attorneys for the respondent the sum of $10,000 within eight (8) days after the service of the order

(R. 56). There is no provision withholding the said sum, pending any appeal or other determination of the proceeding supplementary to judgment; if an appeal were not permitted at this stage of the proceedings, it would in effect penalize the petitioner by ordering his arrest and imprisonment unless he were unconditionally to hand over the sum of $10,000 in cash without any assurance that the District Court had properly determined that it had jurisdiction to so command.

The petitioner maintains that this involved a substantial right within the doctrine laid down by cases decided not only by this Court, but also in the Circuit Court of Appeals for the Second Circuit, as well as by Circuit Courts of Appeals in other circuits.

The doctrine is well stated in the case of *Odell* v. *H. Batterman Co.* (C. C. A. 2, 1915), 223 Fed. 292, in which case the District Court entered an order which denied a landlord's request for permission to commence an action of ejectment in the Supreme Court of the State of New York against the receivers of its tenant. The Circuit Court of Appeals for the Second Circuit, held that the order was a final order because

> *"Under the decisions an adjudication is a final appealable order if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal"* (p. 295). (Italics ours.)

It cannot be said that there would be adequate relief in regard to the $10,000 ordered paid to the attorneys of the respondent, by an appeal which must be postponed until the proceedings supplementary to judgment were terminated, according to Sec. 802 of the Civil Practice Act of the State of New York,

Laws of New York 1935, Ch. 630, §1, p. 1276 (see Appendix, p. 48, *infra*), as suggested by the respondent in its brief in opposition to the writ of certiorari, at page 6 thereof. Under this statutory provision this supplementary proceeding may never terminate. The only relief possible in this case is by an immediate appeal from these orders. If not, the District Court becomes not only the court of first instance, but also that of last resort, determining a right so substantial that it deprives the petitioner of his liberty unless he submit to the will of the District Court and pay out $10,000 of his funds, by order of said court.

The same doctrine was reiterated in *Chief Consol. Min. Co.* v. *Mammoth Min. Co.* (C. C. A. 8, 1928), 29 F. (2d) 703, in which the Court held:

> "'A final order is one which determines a substantial right against a party in such a manner as leaves him no adequate relief except by appeal.' *Odell* v. *Batterman Co.* (C. C. A. 2), 223 F. 292; *American Brake Shoe and Foundry Co.* v. *New York Rys. Co.* (C. C. A. 2), 282 F. 523.
>
> *And this is true irrespective of final decree in the main litigation* (citing cases)" (p. 705). (Italics ours.)

Likewise, in *Rector* v. *United States* (C. C. A. 8, 1927), 20 F. (2d) 845, 872, after a very careful and well considered analysis of finality, the court concluded:

> "* * * *It is certain that an order is final and appealable if it is of a character which settles substantial rights; which makes no reservation as to its effect; which is designed to be operative in a way affecting such rights at once or before or irrespective of the final decree in the main litigation.* With this conception of finality in mind, we proceed to test thereby these orders reducing royalties." (Italics ours.)

Clearly the definition hereinabove set forth in the *Rector* case is applicable to the present proceeding. Not only has the District Court determined that the attorneys for the respondent have judgment for $10,000, enforceable by body execution, but the court has made this judgment unconditionally and without reservation, designed to be operative within eight days regardless of the outcome of the proceedings supplementary to judgment.

Analogous to proceedings supplementary to judgment, in view of the possible length of time they might continue because of Sec. 802 of the New York Civil Practice Act, Laws of New York 1935, Ch. 630, §1, p. 1276, are cases involving receiverships.* It often happens that a receiver must act forthwith and yet the receivership is far from its termination. Need the aggrieved receiver or creditor wait months or perhaps years before he may appeal an alleged erroneous determination of the District Court? The Circuit Court of Appeals for the Second Circuit recently answered this question in *West* v. *Radio-Keith-Orpheum Corporation* (C. C. A. 2, 1934), 70 F. (2d) 621, having before it an appeal from an order of a District Court, granting a receiver's petition for instructions, authorizing the modification of an agreement between defendant Radio Corporation of America and others, from which order the Broadway & 47th Street Corporation appealed. The court, having before it this ever-present question of the finality of orders, held as follows:

"We think too that the order is 'final'. At

* A receiver in these proceedings supplementary to judgment has been appointed by order of Judge Paterson, *U. S. D. J.*, dated April 16, 1936, which receivership is based upon the validity of the service of the subpoena involved herein.

least it authorized the receiver, acting through his control over the subsidiaries, to mortgage new films for the money which the companies got back from the note holders. *No further order was necessary to that end; the receiver would at once act upon the leave then granted.* * * * *The creditors, though their interest was indeed indirect, were therefore concluded, and could get no relief except by appeal.* * * *.

"It is impossible to find a decision quite on all fours. * * * we went much further to entertain an appeal in *American Brake Shoe Co.* v. *N. Y. Railways,* 282 F. 523, than we need here. The variants are too numerous to catalogue; they are set out at length in *Rector* v. *U. S.* (C. C. A.) 20 F. (2d) 845, 860-871 (C. C. A. 8); and it must be owned that when all is said, it is not very plain just what are the 'substantial rights' that a 'final' order must settle. Among the nearer of the decisions in the Supreme Court are *Trustees* v. *Greenough,* 105 U. S. 527, 26 L. Ed. 1157 and *Williams* v. *Morgan, supra,* 111 U. S. 684, 4 S. Ct. 638, 28 L. Ed. 559, which touched allowances, and *In Re Farmer's Loan and Trust Co.,* 129 U. S. 206, 9 S. Ct. 265, 32 L. Ed. 656, and *Central Trust Co.* v. *Grant Locomotive Works,* 135 U. S. 207, 10 S. Ct. 736, 34 L. Ed. 97, which concerned interlocutory proceedings in a receiver's administration. See also *Guarantee etc. Co.* v. *Philadelphia, etc. R. R. Co.,* 69 Conn. 709, 714, 38 A. 792, 38 L. R. A. 804" (p. 624). (Italics ours.)

In *Gas & Electric Securities Co.* v. *Manhattan & Queens Traction Corporation* (C. C. A. 2, 1920), 266 Fed. 625, appeal dismissed (1923), 262 U. S. 196, the Circuit Court of Appeals for the Second Circuit

approving and reiterating the doctrine of *Odell* v. *H. Batterman Co., supra,* stated:

> "The injunction meant the end of the matter so far as the particular judge who issued it was concerned, except that it did not include a change of mind on his part. The order goes just as far and lasts just as long as the District Court is possessed of any authority to issue it, and is therefore 'final' and therefore appealable within the six months period. It is clearly a final order within the rule laid down by this Court in *Odell* v. *H. Batterman Co.,* 223 Fed. 292, 295, 138 C. C. A. 534, 537. In that case the Court below entered an order which denied a request to be permitted to sue the receivers in ejectment. This court held the order was a final order from which an appeal could be taken. We said:
>
> 'Under the decisions an adjudication is a final appealable order, if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief, except by recourse to an appeal. In the suit at bar appellant claims a legal right to immediate possession of the premises, and asserts he is entitled to have that right determined with all reasonable speed. So much of the order appealed from as denied appellant's application was undoubtedly a final order, inasmuch as it definitely and conclusively determined the proceeding which appellant has instituted. *The effect of the order, as we have pointed out, is to leave appellant without relief until the receivership is terminated. When that will be cannot be predicted.* The receivership is a consent receivership and capable of indefinite duration.'
>
> "*We adhere to what was said in the above*

case, and think it decisive of this on the particular matter now under discussion" (p. 633). (Italics ours.)

In *The Farmers Loan & Trust Co., Petitioner* (1889), 129 U. S. 206, this Court granted a writ of mandamus to allow an appeal from an order which determined the rights of parties in a railroad receivership. The order complained of established "certain rights of the parties, to the injury, as petitioners believe, of their interests in the property." This court, with reference to that proposition, held:

"These views we do not propose to elaborate, further than to say that if this order does not give the lender of the money such prior lien upon the proceeds of the property of the company it is because the court had no authority to make it, and as it would be a fraud upon such lender justice could only be done by enforcing it. If this view of the subject be correct, of which we entertain no doubt, *the order is a final one.* It is a decree fixing upon the property, on which the trust company now has a first lien, another lien of $120,000, and making it paramount to that. It changes the relation of that company to this property, displaces its rights as settled by a decree now pending in this court, and if that decree is affirmed, it in effect modifies it, although this court may say that it should stand and be enforced. *This order comes within all the elements of finality which we can imagine to belong to a decree of the Circuit Court. It establishes certain rights of the parties, to the injury, as petitioners believe, of their interests in the property.*

"We need not refer to cases on the subject of finality, for they are numerous, and the principles on which they have been decided apply to

widely varying circumstances. But while we are not aware of any case precisely in point to the one before us, we are satisfied that it is within the purpose of the statute and the principles by which it is to be construed.

"The other reason given why the appeal should not be granted is that the action of the Circuit Court in the case is one within its discretion. All we have to say upon this subject is, that if it be an authority vested in the judges of the Circuit Court, it must be exercised and governed by the principles of a judicial discretion, and the very point to be decided upon an appeal here is, whether they had such discretion, and whether they exercised it in a manner that cannot be reviewed in this court.

"*The question is one which in its nature must be a subject of appeal. Whether the court below can exercise any such power at all,* after the case has been removed from its jurisdiction into this court by an appeal accompanied by a supersedeas, *is itself a proper matter of review; and still more, whether, in the exercise of what the court asserts to be its discretionary power, it has invaded established rights of the petitioners in this case, contrary to law, in such a manner that they can have no relief except by an appeal to this court. This is a matter eminently proper to be inquired into upon an appeal from such an order.* * * * In granting the appeal this court, of course, does not undertake to decide whether the order was rightfully made, if the court had the requisite power, but can only do that upon the hearing of the appeal" (pp. 214, 215, 216). (Italics ours.)

The petitioner, therefore, submits that the orders adjudging him in contempt and directing him to pay

the sum of $10,000 without qualifications and further fining him the sum of $235,082.03 with leave to purge himself by appearing for examination in proceedings supplementary to judgment, constitute an order, which in the language of the decisions above quoted, finally determines a substantial right of the petitioner, leaving him no adequate relief except by an appeal at this time (as in the receivership cases), and therefore the Circuit Court of Appeals for the Second Circuit was in error in dismissing the appeal by order dated March 5, 1936.

POINT B.

The orders of the United States District Court for the Southern District of New York, dated December 19, 1935 and February 7, 1936, constitute a final decision because they order the immediate payment of money.

A proposition somewhat similar to that involved in the instant proceeding was decided by the Circuit Court of Appeals for the Second Circuit in *American Brake Shoe and Foundry Co.* v. *New York Rys. Co.* (C. C. A. 2, 1922), 282 Fed. 523, appeals dismissed for want of jurisdiction (1923), 262 U. S. 736, in which the Circuit Court of Appeals stated:

> "An adjudication is a final appealable order, if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief, except by recourse to an appeal. [Citing *Odell* case.] *If the petitioners have a right of immediate payment, the orders must be regarded as a determination and denial of a substantial right, and which leaves no adequate relief, except by recourse to an appeal. As*

such we have a right to review them" (pp. 527, 528). (Italics ours.)

As to the $10,000 ordered paid to the respondent's attorneys within eight (8) days, there can be no question but that the immediate payment ordered is comparable to the right of immediate payment which the appellants claimed in *Amer. Brake Shoe and Foundry Co.* v. *New York Rys. Co., supra,* and in that case, the Circuit Court of Appeals for the Second Circuit allowed the appeal.

Again, the same court in *Habirshaw Electric Cable Co.* v. *Habirshaw Electric Cable Co., Inc., et al.* (C. C. A. 2, 1924), 296 Fed. 875, certiorari denied (1924) 265 U. S. 587, denied a motion to dismiss an appeal for want of jurisdiction in a case in which there was a mandatory order, "forthwith to return and deliver" claims and securities held by the appellants. The court there stated:

> "Courts seek not to mistake form for substance. Nothing could be more characteristically final than a mandatory order 'forthwith to return and deliver' the claims and securities referred to. * * *.
>
> "Whether we view the second part of this order as a mandatory injunction or as a final order under section 128 of the Judicial Code (Comp. St. § 1120), the result is the same. It will suffice to refer to *McCall* v. *Bladworth, et al.* (C. C. A.) 290 Fed. 365; *The Flush* (C. C. A.) 277 Fed. 25" (p. 878).

It is submitted that the instant question was ably answered in *City of Eau Claire* v. *Payson* (C. C. A. 7, 1901), 107 Fed. 552. In that case there was a motion to dismiss an appeal on the ground that the order

directing the city to pay the sum of $1600 to the receiver of the Eau Claire Waterworks Company was not final. Denying the motion, the court held:

> "That the order was appealable there should be no serious doubt. *To the extent of the payment required, it was essentially a final decree. It was made without jurisdiction over the party affected, compelled the immediate surrender of a large sum of money, and made no provision for its safekeeping or return in case a return should be found necessary.* * * * The supreme court has not placed upon the words 'final decree', respecting the right to appeal, a strict and technical sense, but has given them a liberal and reasonable construction (citing cases)" (pp. 556, 557). (Italics ours.)

Is this not what has happened by the orders of the District Court dated December 19, 1935 and February 7, 1936? The petitioner has always claimed a lack of jurisdiction of the party affected, the immediate surrender of $10,000 has been compelled and there is no safeguard in case a return should be found necessary.

In *In re Michigan Central Railroad Co.* (C. C. A. 6, 1903), 124 Fed. 727, a writ of mandamus to compel the allowance of an appeal was granted in a case in which there was a petition by the Clerk of the United States Circuit Court for the Eastern District of Michigan for compensation for receiving, keeping and paying out all moneys under order of the court, etc. The district court ordered the railroad company to pay to the said clerk the sum of $2,710.85 "as prayed, and that said petitioner have execution therefor". A petition praying for an appeal having been denied, the

company prayed for a writ of mandamus. The court in granting said writ, held:

> *"That the decree was final, we have no doubt. It finally settles the liability of the petitioner to pay to W. S. Harsha, as clerk, the sum of $2,710.85, and directs execution to issue therefor. It was upon a matter distinct from the general subject of the litigation. Trust Co.* v. *Grant Locomotive Works,* 135 U. S. 207, 224, 10 Sup. Ct. 736, 34 L. Ed. 97. *Nothing remains to be done but to collect and pay out the money. An affirmance here will end the matter forever. Such a decree is final, so far as to be appealable* (citing cases). * * * When this decree is executed, it is a complete end of the whole claim for commissions or compensation, so far as the same had accrued and was presented by the intervention of Harsha" (pp. 730, 731).
>
> "Nor is it essential to the right of appeal that the allowance shall be made from a fund in court. If there is no fund, and the court undertakes to provide one by pronouncing a decree against one of the parties to the proceeding, and directs execution to issue, every reason exists for allowing a review which could possibly exist when an allowance is made out of a fund in which the appealing party has only an interest.
>
> "The conclusion we reach is that the appeal prayed was wrongfully denied" (p. 734). (Italics ours.)

In the proceeding at bar, the order not only directed the payment of $10,000, but also directed a body execution to issue therefor (R. 56). Thus, these cases are parallel with respect to the point at issue.

In *Jacksonville, T. & K. W. Ry. Co. et al.* v. *American Const. Co. et al.* (C. C. A. 5, 1893), 57 Fed. 66,

the Circuit Court for the Northern District of Florida ordered the receiver of the defendant to pay petitioners, attorneys for the complainant, a fee of $5,000 out of the funds on hand, arising from the operation of the railroad properties which had been included in an order appointing the receiver.

When the receiver appealed, the appellee moved to dismiss said appeal, which motion was overruled, the court holding:

> "A decree by a circuit court of the United States, directing that the complainant be paid his costs and expenses out of the fund in court,—the fund in the meantime remaining in the court, in the course of administration,—is, *pro tanto, a final decree,* from which, if the amount be sufficient, an appeal will lie. *Trustees* v. *Greenough,* 105 U. S. 527" (p. 69). (Italics ours.)

See also *Empire Trust Co.* v. *Brooks* (C. C. A. 5, 1916), 232 Fed. 641, certiorari denied, (1917) 243 U. S. 655, in which the court held:

> "The decree was certainly not determinative of the issues presented by the original bill. It did, however, finally determine the issues presented by the intervention of appellee. * * * *we think the decree appealed from, directing the receiver in a foreclosure suit to turn the property over to the receiver appointed by the state court, was final.* * * * The motion to dismiss is overruled. * * *" (p. 642). (Italics ours.)

This court has definitely determined that an order directing a sum of money to be paid, such as in the instant case, is appealable, as far back as 1848, when the case of *Forgay* v. *Conrad,* 6 How. (47 U. S.) 201,

was decided. A motion to dismiss an appeal had been made and in overruling said motion, this court held:

> "The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature" (p. 203).
>
> "*And when the decree * * * directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as final to that extent, and authorizes an appeal to this court,* although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed" (p. 204). (Italics ours.)

In 1868, in *Thomson* v. *Dean,* 7 Wall. (74 U. S.) 342, the rule of *Forgay* v. *Conrad, supra,* was reiterated, quoted and followed in denying a motion to dismiss an appeal. This court held:

> "*In this case the decree directs the performance of a specific act, and requires it to be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree of sale. It looks to no future modification or change of the decree*" (p. 345). (Italics ours.)

Thus, in spite of the fact that in addition to the immediate performance of the specific act ordered, accounts were later to be adjusted between the parties, pursuant to a decree settling the question of ownership, the order was held to be *final.*

See also *Stovall* v. *Banks* (1870), 10 Wall. (77 U. S.) 583, in which this Court stated:

> "It cannot be maintained that a decree which adjudges a certain sum of money to be due from a defendant to the complainant, and awards execution to collect it, is not a final decree conclusive on the parties" (p. 586).

The petitioner respectfully urges that this court determine in view of these prior decisions, and in view of the many decisions of the Circuit Courts of Appeal, that the orders of December 19, 1935, and February 7, 1936 are final orders within the doctrine hereinabove set forth, and that the Circuit Court of Appeals for the Second Circuit, by its order of March 5, 1936 decided the question before it contrary to the controlling decisions of this Court and of the several Circuit Courts of Appeal.

POINT C.

In a case in which the District Court has neither jurisdiction nor power to make an order therein, a "final" order is to be found in the circumstances.

This Court in *Phillips* v. *Negley* (1886), 117 U. S. 665, had before it an order of the Special Term of the Supreme Court of the District of Columbia, which had vacated and set aside a judgment in favor of the plaintiff and had granted a new trial *out of term.* An

appeal had been taken to the General Term of the Supreme Court of the District of Columbia, which had dismissed the appeal, having found no error in the Special Term. A writ of error to this Court brought the question of the jurisdiction of the Special Term squarely before it.

At the outset, this Court interpreted the order of the General Term to be a dismissal of the appeal for want of jurisdiction, as the order was not only within the power of the Supreme Court at Special Term, but also a discretionary order. This same argument was advanced in an effort to dismiss the writ of error in this Court.

This Court held that it had jurisdiction to hear the appeal and upon appeal, reversed the proceedings and judgment below on the ground that the District Court had no jurisdiction. With reference to appealability, this Court held:

> *"If, * * *, the order was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court. The question of the jurisdiction of this court to entertain the present writ of error, therefore, necessarily involves the jurisdiction of the Supreme Court of the District, both at special and general term, and the nature and effect of the order brought into review, so that the question of our jurisdiction is necessarily included in the question of the validity of the proceeding itself"* (117 U. S. 665, 671, 672). (Italics ours.)

The petitioner contends that the instant question is controlled by the decision in *Phillips* v. *Negley, supra.* He contends, further, that the finality of the orders of December 19, 1935 and February 7, 1936, is depend-

ent upon the power of the District Court to make such orders. This court laid down the doctrine that an order which is predicated upon assumed power and jurisdiction such as the orders now before it *must* be the subject of review by an appellate court. If there can be no appellate review, then in the instant proceeding, it is submitted, this petitioner is deprived of his constitutional rights granted to him by the Fifth Amendment of the Constitution of the United States.

In 1888, a petition for a writ of mandamus to allow an appeal was granted by this court, in *The Farmers Loan & Trust Co., Petitioner,* 129 U. S. 206. In the opinion, one of the grounds for the granting of the writ is found in the following paragraph:

> *"The question is one which in its nature must be a subject of appeal. Whether the court below can exercise any such power at all,* after the case has been removed from its jurisdiction into this court by an appeal accompanied by a supersedeas, *is itself a proper matter of review; and still more, whether,* in the exercise of what the court asserts to be its discretionary power, *it has invaded established rights of the petitioners in this case, contrary to law, in such a manner that they can have no relief except by an appeal to this court. This is a matter eminently proper to be inquired into upon an appeal from such an order.* * * * In granting the appeal this court, of course, does not undertake to decide whether the order was rightfully made, if the court had the requisite power, but can only do that upon the hearing of the appeal" (pp. 215, 216). (Italics ours.)

Thus, it seems in so far as the orders appealed from are concerned, this court, despite the limitation

in the writ of certiorari restricting argument to the question of the jurisdiction of the Circuit Court of Appeals (R. 97), *must* inquire into the jurisdiction of the District Court for the Southern District of New York in this proceeding, for under the doctrine of the last two cases cited, it seems clear that the jurisdiction of the appellate court is dependent upon and can only be determined by the primary question of the District Court's power.

The petitioner contends, as he has always contended, that the District Court never acquired jurisdiction by virtue of the service of the subpoena in proceedings supplementary to judgment upon him within the State of Pennsylvania (R. 2).

The jurisdiction of the United States District Court for the Southern District of New York is expressly defined by Congress in Section 97 of the Judicial Code, as amended by Act of Congress July 1, 1922, c. 260, 42 Stat. 812 (Title 28, U. S. Code, Sec. 178). Service of process to commence an action or special proceeding must be effected within its territorial limits. This rule is firmly established and process which is served outside the physical limits of the district is invalid. This court has held in *Munter* v. *Weil Corset Co.* (1923), 261 U. S. 276, and in *Robertson* v. *Labor Board* (1925), 268 U. S. 619, that such process must be served upon the person to whom it is directed within the district. Judicial Code, Sec. 51 (Title 28, U. S. Code, Sec. 112) as amended by Act of Congress March 4, 1925, Ch. 526, Sec. 1, 43 Stat. 1264.

In *Robertson* v. *Labor Board, supra,* this court, stated the jurisdictional limitations of the District Court as follows:

"Under the general provisions of law, a United

States district court cannot issue process beyond the limits of the district, *Harkness* v. *Hyde,* 98 U. S. 476; *Ex Parte Graham,* 3 Wash. 456; and a defendant in a civil suit can be subjected to its jurisdiction *in personam* only by service within the district. *Toland* v. *Sprague,* 12 Pet. 300, 330" (268 U. S. 619, 622).

In the recent case of *Adair* v. *Employers' Reinsurance Corporation* (D. C., N. D. Texas, 1935), 10 F. (Supp.) 725, motions were made by the defendants to quash service of process in an action under the Workmen's Compensation Act of Texas. In granting the motions, the court held:

"A civil suit purely *in personam* may not go forward against a defendant without either a voluntary appearance or the legal service of process at a place where the officer serving it has authority to do so. *A United States District Court cannot issue process beyond the limits of its own district. A defendant cannot be subjected to its jurisdiction in personam by pretended service outside of the district. Robertson* v. *Railroad Labor Board,* 268 U. S. 619, 45 S. Ct. 621, 69 L. Ed. 1119" (p. 726). (Italics ours.)

Likewise, in *Creager* v. *P. F. Collier & Son Co., et al.* (D. C., S. D. Texas, 1929), 36 F. (2d) 781, a motion to quash the service of a citation was granted wherein process out of the District Court for the Southern District of Texas had been served in the Northern District of Texas, the court holding, as follows:

"Jurisdiction of the federal court over a defendant being special and dependent upon the valid service of process, since the service on the defendant is invalid, because issued to and served

> in another district, it is unnecessary to determine whether the defendant is doing business in the Northern District of Texas, or whether Smalley is its agent there" (p. 783).

A case which is very closely analogous to the instant proceeding, is *New York Indemnity Co.* v. *Rasmusson* (D. C., S. D. Texas, 1932), 1 F. (Supp.) 156, in which a motion to dismiss the action for want of jurisdiction and invalidity of the process and service thereof was granted. The process had been served outside the district but in the district in which the defendants lived. Holding the process void, the court stated:

> "Although a proceeding such as this to set aside an award of the industrial accident board is variously referred to as an appeal, review, etc., such proceeding is in fact a *new suit,* in which *new process,* etc. must issue. Section 5, article 8307, supra. See Articles 1971, 1972, 1973, and 2021, Texas Revised Civil Statutes, 1925, which prescribe how suits are to be instituted. A suit in this court to set aside an award is of the same kind as in the state court, and is by 'Original Process' within the meaning of section 112" (p. 159). (*Italics the court's.*)

It has been the contention of the petitioner throughout, that the proceedings supplementary to judgment are special proceedings, independent of the original action in which the judgment was obtained. As the court in the last cited case said:

> "such proceeding is in fact a *new suit,* in which *new process,* etc. must issue. Section 5, article 8307, *supra.* See Arts. 1971, 1972, 1973 and 2021, Texas Revised Civil Statutes, 1925, which prescribe how suits are to be instituted. A suit in

this court to set aside an award is of the same kind as in the state court, and is by 'Original Process' within the meaning of Sec. 112 [Title 28, U. S. Code, Sec. 112, Judicial Code, Sec. 51, as amended by Act of Cong. Mar. 4, 1925, Ch. 526, §1, 43 Stat. 1264]" (p. 159). (Italics the Court's.)

Just as the Texas Revised Civil Statutes prescribe how suits are to be instituted in the *New York Indemnity Co.* case, *supra,* so does Article 45 of the New York Civil Practice Act, Laws of New York 1935, Ch. 630, §1, pp. 1265-1279, having been adopted by Common Law Rule V of the United States District Court for the Southern District of New York (see Appendix, p. 47), pursuant to Act of Cong. June 1, 1872, Ch. 255, §6, 17 Stat. 197, R. S. Sec. 916 (Title 28, U. S. Code, Sec. 727), determine how proceedings supplementary to judgment are to be instituted. *In the State Court, they are special proceedings, in which new process must issue.* The Federal District Court, sitting in the State of New York and having adopted the state practice as to proceedings supplementary to judgment, must be governed by the same limitations found in the *New York Indemnity Company* case, *supra.* It was, therefore, error for the District Judge to disregard the state statutes in this regard, which are the law of the United States District Court for the Southern District of New York, to the same extent as if Congress itself had expressly passed that legislation.

Fink v. *O'Neill* (1882), 106 U. S. 272, 276;
Custer v. *McCutcheon* (1931), 283 U. S. 514, 516.

The rule is clearly defined in *Ex Parte Boyd* (1881), 105 U. S. 647, 652, thus:

> "It is the settled doctrine of this court, as established and explained by these authorities, that the power of Congress, under the Constitution, as well as that of the courts of the United States, acting under its authority, extends to the adoption of the laws of the several states, not only as to the nature and form of writs of execution for the enforcement of judgment, but also as to *all proceedings thereupon.*" (*Italics the Court's.*)

Amy v. *Watertown* (1889), 130 U. S. 301, confirms the rule that the District Court for the Southern District of New York is definitely bound to follow the New York State practice, with reference to supplementary proceedings, and requires that the subpoena which institutes supplementary proceedings must be served in the same manner as the State statute provides for service in a State court proceeding. In that case, this Court held:

> "But the statute of 1872 is peremptory, and whatever belongs to the three categories of practice, pleading and forms and modes of proceedings, *must* conform to the state law, and the practice of the state courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the act of Congress is to be followed in preference to the laws of the State. With regard to the mode of serving mesne process upon corporations and other persons, Congress had not laid down any rule; *and hence the state law and practice must be followed. There can be no doubt, we think, that the mode of service of process is within the categories named in the act. It is part of the*

practice and mode of proceeding in a suit" (p. 304). (Italics ours.)

* * * * * * * *

"Here we are bound by statute; and not by the state statute alone, but by the act of Congress, which obliges us to follow the state statute and state practice. *The Federal Courts are bound hand and foot, and are compelled and obliged by the Federal legislature to obey the state law;* and according to this law the judgment of the Circuit Court was correct and is, therefore, *affirmed"* (p. 320). (Italics ours.)

There remains thus to inquire as to the applicable New York law. Section 773 of the Civil Practice Act, Laws of New York, 1935, Ch. 630, §1, page 1266, defines supplementary proceedings as special proceedings. (See Appendix, *infra*, p. 47.) *Meyers* v. *Consolidated Ice Co.* (1909), 196 N. Y. 471, 473. In *Harris* v. *Weiss* (not officially reported) (1906), 105 N. Y. Supp. 8, 9, is found a detailed statement by the commissioners who drafted the statutory provisions now contained in Article 45 of the Civil Practice Act to the effect that supplementary proceedings and the code provisions were intended to and did set up *supplementary proceedings as separate, independent and original proceedings.*

The Court wherein the judgment was obtained does not, therefore, retain any jurisdiction over the person of the defendant for the purpose of supplementary proceedings by reason of the original service of the summons in the action. A new and independent process must be served in the same manner and to the same extent as a summons in an action in order properly to institute the supplementary proceedings. *Rosen* v. *Polansky* (1923), 121 N. Y. Misc. 395.

Additional support for this proposition is found in the new Article 45 of the New York Civil Practice Act at Sec. 777, Laws of New York 1935, Ch. 630, §1, pp. 1268, 1269, which provides for *instituting* proceedings supplementary to judgment, as follows:

> "Sec. 777. WHERE PROCEEDING AGAINST JUDGMENT DEBTOR INSTITUTED. The proceeding authorized by this article may be instituted in the civil court of record in which the judgment was recovered and in the county where the judgment debtor resides or has a place for the regular transaction of business in person. Where the debtor neither resides nor has such place of business in the county of such court, then the proceeding shall be instituted in the county court or supreme court of the county wherein he resides or has such place of business. If the judge or justice is absent from the county or for any reason unable or disqualified to act, then before a justice of the supreme court or county court or surrogate of such county, or under such circumstances and upon order of such justice of the supreme court or county judge, the examination may be held before any judge or justice of any of said courts in an adjoining county. Where the judgment has been recovered in a court not of record, the proceeding may be maintained in the supreme court or county court as above provided. Where the judgment was recovered in the municipal court of the city of New York, the proceeding shall be instituted in the city court of the city of New York, whether or not any transcript of judgment has been filed in the office of any county clerk."

There can be no doubt that there remains in the court in which the judgment was rendered *no* jurisdiction to commence proceedings supplementary to

judgment without *new process.* Proceedings must be *instituted* either in that court or some other as provided for in Sec. 777. In two instances, the court which rendered the judgment (*i. e.,* if a court not of record, or the Municipal Court of the City of New York), has no jurisdiction to entertain proceedings supplementary to judgment rendered in said court, but such proceedings must be instituted in other courts as provided for in Sec. 777. How then can it be claimed that such proceedings are ancillary to the original action in the court which rendered the judgment?

A special proceeding is distinguished from an action by Sec. 46-a of the New York General Construction Law (Cons. Laws, Ch. 22, 1920), Laws of New York 1920, Ch. 917, §1, p. 2350, as follows:

> "Every prosecution by a party against another party in a court of justice which is not an action is a special proceeding."

Section 218 of the Civil Practice Act, Laws of New York 1920, Ch. 925, §218, p. 90, provides:

> *"A civil action is commenced by the service of a summons,* which is a mandate of the court. Rules may be made respecting the requisites and form of a summons and notice and endorsements thereon." (Italics ours.)

Section 403 of the Civil Practice Act, Laws of New York 1920, Ch. 925, §403, p. 149, defines a subpoena as a legal process.

Rule 21 of the New York Rules of Civil Practice (adopted pursuant to Laws of New York 1920, Ch. 902, §1, p. 2263, as amended by Laws of New York

1921, Ch. 370, §1, p. 1166), entitled *"Manner of Service of Papers to Begin a Proceeding"* provides:

> *"The provisions of the statutes and rule relating to the mode of personal service of a summons shall apply to the service of any process or other paper whereby a proceeding is begun in a court,* or before an officer, except a proceeding to punish for contempt, unless other special provision for the service thereof is made by law or rule. Other papers in a proceeding shall be served in like manner as in an action." (Italics ours.)

Section 225 of the Civil Practice Act, Laws of New York 1920, Ch. 925, §225, p. 92, reads as follows:

> "Personal service of the summons upon the defendant being a natural person must be made by delivering a copy thereof *within the state* as follows: * * * to the defendant in person." (Italics ours.)

For further elucidation as to the proper institution of a special proceeding, see *Hill* v. *Hill* (1924), 124 N. Y. Misc. 102, in which the Court held:

> "This is a special proceeding. * * * Service upon the various parties herein has been made in the manner provided for the personal service of a summons. The court, therefore, has acquired jurisdiction of the parties" (124 Misc. 102, 105).

It follows, therefore, that the subpoena which sought to commence the special proceeding, entitled, "Proceedings Supplementary to Judgment" is required to be served within the jurisdiction of the Court in the same manner, exactly, as a summons in an action. And a summons in an action or proceeding *in personam* must be served within the territorial limits

of the Southern District of New York under the controlling decisions of *Robertson* v. *Labor Board,* (1925) 268 U. S. 619 and *Munter* v. *Weil Corset Co.,* (1923) 261 U. S. 276. Proceedings supplementary to judgment are proceedings *in personam. Matter of Maltbie* v. *Lobsitz Mills Co.,* (1918) 223 N. Y. 227, 232, 234, expressly defines supplementary proceedings as "proceedings *in personam* and not *in rem*" and "being a summary proceeding created by statute and in derogation of the common law, must be strictly construed" and which "cannot be enlarged by construction nor by law available or valid, except by strictly following the directions of the act."

In the *Munter* case, *supra,* this Court held:

> "The service on Munter was void. The Distric Court of Connecticut had no power to send its process to New York for service" (p. 279).

Thus, the conclusion is inescapable that the process served in Pennsylvania was of no effect and void and the District Court had no power to adjudge and punish the petitioner for contempt.

The respondent argued in its brief in opposition to the petition for the writ of certiorari, at page 3 thereof, that the Act of Congress, Sept. 19, 1922, c. 344, 42 Stat. 848, Mar. 4, 1925, c. 526, 43 Stat. 1264 (Section 876 of the Revised Statutes, Title 28, U. S. C., Sec. 654), which provides for service of a subpoena upon a witness in a pending proceeding within a hundred miles from the holding of court, applies to the service upon the petitioner herein, and cites for its proposition *Meyer* v. *Consolidated Ice Co.* (D. C., E. D. N. Y., 1908), 163 Fed. 400, claiming it to be "direct authority for this point, and has been followed without question by the bar for twenty-eight

years" (Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 3). Even a cursory examination of the *Meyer* case will establish that "the entire proceeding must be dismissed" (163 Fed. 400, 404) because the applicable law of the State of New York did not give the judgment creditor the right to examine a corporate judgment-debtor. Everything else is dicta and has no more standing than a private opinion; surely it is not a binding precedent.

It seems strange indeed that the respondent, when put to the necessity of arguing on the merits for the first time since the argument on the motion which resulted in the opinion of Judge Bondy (R. 6), in its brief in opposition to the petition for the writ of certiorari (p. 3), does not attempt to support the holding of Judge Bondy. Can it be that the weakness in the District Court's position is so manifest that the respondent concurs in the petitioner's belief that the proceeding is not ancillary but original in the sense that new process must issue? The respondent feels the question not sufficiently important to consider (Brief, p. 5) and relies on Sec. 876 of the Revised Statutes (28 U. S. C., Sec. 654) instead of Judge Bondy's conclusion. Therefore, it is incumbent upon the petitioner to meet this argument which the respondent considers the basis of the jurisdiction over the petitioner and the foundation for the power of the District Court to adjudge and punish the petitioner for contempt.

Under the old Article 45, which was expressly repealed by Sec. 1 of Ch. 630 of the Laws of New York, 1935, p. 1265, effective Sept. 1, 1935, at Sec. 773-A, Laws of New York 1932, Ch. 452, §1, p. 995, the following was found:

"* * *. Such subpoena is a process in the name

of the court and may be served in the same manner as a subpoena issued to a witness in an action pending in the court in which such examination is to be had except that the judgment debtor shall not be entitled to receive a witness fee or mileage for attendance."

Had the subpoena in question been served prior to September 1, 1935, it might be arguable that the subpoena served as it was could institute the special proceeding; for at that time Sec. 773-A of the New York Civil Practice Act might have been considered as laying a foundation for the applicability of Sec. 876 of the Revised Statutes. But the legislature of the State of New York in the new Sec. 45, effective Sept. 1, 1935, expressly omitted the provision above quoted from Section 773-A and thus Sec. 783 (see Appendix, p. 48) which governs the manner of service of orders, subpoenas and warrants, is controlling in this case, as the subpoena served upon the petitioner was served after the effective date of the new Art. 45 (R. 2). Thus, all that has been stated as to the service of process to commence a special proceeding constitutes the applicable law on the subject today, and Sec. 876 of the Revised Statutes can have no applicability to the instant proceeding. Furthermore, there was no pending proceeding at the time of the service of the subpoena on the petitioner, for it is the service of this very subpoena upon the petitioner *as a party* which is relied upon as the process instituting the proceeding.

Moreover, R. S. Sec. 876 (28 U. S. C. Sec. 654) provides for service upon a witness who lives within a hundred miles of the courthouse. Although the word "lives" has been interpreted to include a place of temporary sojourn, it has never been extended to include a situation, as here, where service was effected upon a railroad train (R. 2) where the very

act of traveling demonstrates that the place of service was not a place of sojourn.

This contention that, because the District Court had no power in the premises to make the order, said order is "final", has previously been before the Circuit Court of Appeals for the Second Circuit in *Motion Picture Patents Co.* v. *Steiner, et al.* (C. C. A. 2, 1912), 201 Fed. 63. In determining that the order appealed from was appealable, the Court held:

> "We are inclined to think that the order is appealable for the reason that the complainant's contention is not that the court abused its discretion or made an excessive award of costs, but that there is no law permitting such an award. *In re Michigan Central Ry. Co.,* 124 Fed. 727, 59 C. C. A. 643.
>
> "The decree should be reformed as prayed for * * *" (p. 65).

Likewise the same court in *S. M. Hamilton Coal Co.* v. *Watts* (C. C. A. 2, 1916), 232 Fed. 832, Judge Learned Hand, writing for the court which reversed an order vacating a judgment and granting a new trial, held:

> "An order of the character under review, which is equivalent to one setting aside a judgment and granting a new trial, being in the discretion of the court below, is not within the jurisdiction of this court to review. *If, however, the action of the court is beyond its jurisdiction, that question and that alone may be reviewed by writ of error. City of Manning* v. *German Ins. Co.,* 107 Fed. 52, 46 C. C. A. 144; *Phillips* v. *Negley,* 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013" (p. 834). (Italics ours.)

Assuming that Judge Hand is correct in limiting

the review to the sole question of the jurisdiction of the District Court, the petitioner contends that he has not even been accorded that much by that very court in this proceeding.

In *City of Manning* v. *German Ins. Co.* (C. C. A. 8, 1901), 107 Fed. 52, the court as to a similar order, held as follows:

> "* * * An order granting or refusing a new trial, which the court has jurisdiction or power to make is discretionary, and cannot be reviewed by writ of error or appeal in the Federal courts (citing cases). *But the question whether or not the court had the jurisdiction or power to make an order granting or refusing a new trial and avoiding a former judgment is always reviewable in the federal courts by a writ of error or an appeal challenging the order,* BECAUSE IT GOES TO THE EFFECT AND FINALITY OF THE JUDGMENT ITSELF. *Phillips* v. *Negley,* 117 U. S. 665, 671, 675, 678, 6 Sup. Ct. 901, 29 L. Ed. 1013" (p. 54). (Italics ours.)

In *Newton* v. *Consolidated Gas Co.* (1923), 265 U. S. 78, the question raised was the appealability of an order taxing costs. This Court found that in general no appeals were allowed from such orders, as they are within the court's discretion. As the question was not one of discretion, but one of power, this Court held the order was appealable, stating through Mr. Chief Justice Taft, the following:

> "* * * When the power of the court to assess costs against either party is not in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are ~~now~~ Not allowed. *But the rule is not absolute and should not be enforced when the trial court assumes the power*

to assess as costs against a fund or a party expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed. * * * We think the distinction made in that case [*In Re Michigan Central R. R. Co.*, 124 Fed. 727] a sound one and that as the question here is presented, the appeal is a proper one" (pp. 83, 84). (Italics ours.)

POINT D.

The orders of the District Court, dated December 19, 1935, and February 7, 1936, punished this petitioner for contempt of court. In a similar case in which the contention that the District Court lacked jurisdiction was presented, the Circuit Court of Appeals reversed the order on the merits without questioning its finality.

It is elementary that the United States courts are strictly limited to jurisdictional requirements in each case which comes before them. Whether or not objection is made to the jurisdiction of the court, the court on its own motion, if necessary, must be satisfied that it has the requisite jurisdictional facts in the record. This Court has held in *Mansfield C. & L. M. RR. Co.* v. *Swan* (1884), 111 U. S. 379, 382, that "on every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes." This doctrine was recently reiterated in *Mitchell* v. *Maurer* (1934), 293 U. S. 237, in which the court held:

> "*Third.* Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of

> the lower courts in a cause under review. *Mansfield C. & L. M. Ry. Co.* v. *Swan,* 111 U. S. 379, 382. Hence, the failure of the Insurance Commissioner to claim, in his petition for certiorari, that the order of the District Court was void for lack of federal jurisdiction of the suit, and his failure otherwise to call attention of this Court the lack of diversity of citizenship are immaterial * * *" (p. 244).

Thus, any decision of a Circuit Court of Appeals necessarily presupposes that the requirements of finality have been met. Unless the jurisdictional requirements are present, the Circuit Court will inquire *sua sponte* as to its jurisdiction and dismiss an appeal if the lack of it be found. *Western Electric Co., Inc. et al.* v. *Pacent Reproducer Corp.* (C. C. A. 2, 1930) 37 F. (2d) 14.

The Circuit Court of Appeals for the Second Circuit has already had before it a like case in which the question of finality of a contempt order as to one George M. Laub was not commented upon; yet as the Circuit Court of Appeals reversed the order on the merits, the conclusion is inescapable that there was an appealable order before it.

In *McCall Co.* v. *Bladworth* (C. C. A. 2, 1923), 290 Fed. 365, an injunction had been issued against the defendants in a suit in equity. George M. Laub, and two other appellants appealed from orders which held Laub guilty of contempt of court and merely reprimanded the other appellants. Laub was a citizen and resident of the State of New York, who was served with the *subpoena ad testificandum* in New York City in this suit, which was before the District Court for the District of Connecticut. He appeared at the hearing in response to the subpoena, but the jurisdic-

tional point was reserved. The order of the District Court for the District of Connecticut reads:

> "The court finds the said respondent George M. Laub is in contempt for violation of the injunction heretofore issued herein, and it is hereby ordered that the respondent George M. Laub pay into the court for the use of the plaintiff, within —— days of the entry of this order, the sum of $500, and that, when paid, *it be paid over to the plaintiff, the McCall Company, as a compensation for its time and outlay in prosecuting this application*" (290 Fed. 365, 366). (Italics ours.)

Laub was served with no process in Connecticut and only the aforementioned *subpoena ad testificandum* in the State of New York. Judge Mayer, in the Circuit Court of Appeals for the Second Circuit, held as follows:

> "As to Laub: In view of the fact that Laub was a citizen and resident of New York, process could not be served upon him, and the court could not gain jurisdiction as to him. *Munter* v. *Weil Corset Co., Inc.*, 43 Sup. Ct. 347, 67 L. Ed. ——, decided February 26, 1923. * * * While the order, quoted supra, is in this respect somewhat confused, we are satisfied that it preserved the jurisdictional point, as the court intended it should. This being so, *it is plain that the court was wholly without jurisdiction to entertain any contempt proceeding against Laub*" (pp. 368, 369). (Italics ours.)

It must be noted that as to the other two appellants, the court held the order denying a motion to punish them for contempt (but which instead reprimanded them) a final order from which they could appeal. As to Laub, no mention of finality is made but under accepted doctrine, the Circuit Court of Appeals could

not have reversed if it had not had jurisdiction to hear Laub's appeal. *Western Electric Co., Inc. et al.* v. *Pacent Reproducer Corp., supra.* Hence, this case is squarely in point with the one at bar, in that the petitioner, just as Laub, appealed to the Circuit Court of Appeals because there was no jurisdiction over the person to punish him for contempt.

POINT E.

As the orders of the District Court, dated December 19, 1935, and February 7, 1936, are dual in nature, being final as to the $10,000 ordered paid to the respondent's attorneys, the Circuit Court of Appeals has jurisdiction to hear the appeal.

Assuming but not conceding that an order punishing a party for contempt of court is not appealable, unless it be for criminal contempt of court or after a final decision in an equity suit for an injunction, and thus finality must rest on some other doctrine, if there is a part of the order which is sufficient to ground an appeal, the Circuit Court of Appeals can hear the whole case; especially is that true as to jurisdiction in that it must inquire as to the jurisdiction of the district court before it hears anything as to the merits.

This proposition is found in the decision of *Potter* v. *Beal* (C. C. A. 1, 1892), 50 Fed. 860, in which the court held that the determination of the District Court "is governed by the essence of what is done, and not by the appellation given to it". This means, in relation to the present case, that despite the fact it is a contempt order, if a substantial right or if a question of the power of the court to do a certain thing is raised, the court has jurisdiction to hear the appeal regardless of what the order is entitled, and once the court

has jurisdiction to hear the appeal, it may decide the issue as it should have been decided in the court below. Accord, as to interpreting an order according to its "essence", *The Attualita* (C. C. A. 4, 1916), 238 Fed. 909, wherein the court held:

> *"The question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by the appellate court on consideration of the essence of what is done by the decree. Potter* v. *Beal, et al.,* 50 Fed. 860, 2 C. C. A. 60" (pp. 910, 911). (Italics ours.)

In *Brownson* v. *United States* (C. C. A. 8, 1929) 32 Fed. (2d) 844, the District Court ordered the appellant to appear and testify in a hearing before an agent of the Commissioner of Internal Revenue and that he stand committed to jail for contempt unless and until he complied with said order to testify. As to the dual nature of the order appealed from, the court held:

> "The order under discussion is, however, dual in its nature. It first *unconditionally* orders the witness to appear and testify and to produce certain papers; it secondly commits the witness to jail conditionally. *We think that for the purpose of determining appealability the first part of the order, which is complete in itself, should alone be considered.* That such an order is appealable we think is established. *Perlman* v. *United States,* 247 U. S. 7, 38 S. Ct. 417, 62 L. Ed. 950; *Ellis* v. *Interstate Commerce Commission,* 237 U. S. 434, 442, 34 S. Ct. 645 (59 L. Ed. 1036); *United States* v. *First National Bank of Mobile* (D. C.) 295 F. 142, affirmed 267 U. S. 576, 45 S. Ct. 231, 69 L. Ed. 796. In the case last cited, the Supreme Court entertained an appeal from an order of the District Court directing

a witness to appear and testify and to produce books and papers in a case very similar to the case at bar. *The affirmance of the order necessarily involved a holding that the order was appealable*" (p. 846). (Italics ours.)

In the instant case, the petitioner likewise contends that the orders of December 19, 1935 and February 7, 1936 are dual inasmuch as they both order a fine and the payment of $10,000 to the attorneys for the respondent in addition to the fine, which payment must be made except upon the forfeiture of the petitioner's liberty. *Hence, that part of the order, unconditionally commanding payment of the aforesaid sum of $10,000 is complete in itself, and thus is a final order sufficient to give the Circuit Court of Appeals jurisdiction to hear the appeal within the doctrine of the Brownson case, supra.*

CONCLUSION.

It is therefore respectfully submitted that the order of the United States Circuit Court of Appeals for the Second Circuit dated March 5, 1936, was erroneously made; that the Circuit Court of Appeals has jurisdiction to hear an appeal from the orders of the United States District Court for the Southern District of New York, dated December 19, 1935 and February 7, 1936, and that this Court reverse the determination of the United States Circuit Court of Appeals for the Second Circuit, dated March 5, 1936, and direct that the appeal be heard upon the merits.

Respectfully submitted,

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APPENDIX.

Common Law Rule 5 of the United States District Court for the Southern District of New York provides as follows:

> "In Common Law causes the parties shall be entitled to the same rights and remedies as respects attachments against the property of the defendant, and as respects, proceedings supplementary to execution, as are now or may be hereafter provided by the laws of the State of New York, which laws (in respect of Common Law causes) are hereby adopted."

The applicable sections of **Article 45 of the New York Civil Practice Act,** entitled "Proceedings Supplementary to Judgment" (Sections 773 through 810), are as follows:

> "§ 773. IN WHAT CASES JUDGMENT CREDITOR MAY MAINTAIN PROCEEDINGS. To entitle a judgment creditor to maintain a special proceeding authorized by this article, the judgment must have been rendered in any sum by any court of this state, whether or not of record. A decree or order awarding the payment of money shall be deemed a judgment for the purpose of this article. A proceeding may be maintained until such judgment is satisfied, vacated or barred by the statute of limitations. [Added by L. 1935, ch. 630, in effect Sept. 1.]"

> "§ 774. HOW PROCEEDINGS MAY BE INSTITUTED. Proceedings under this article may be instituted:
>
> 1. By order of the court.
> 2. By subpoena of the judgment creditor's at-

torney, served upon the judgment debtor, a third party or a witness.

3. By warrant issued as in this article provided.

Such order or subpoena shall require the attendance of the judgment debtor or third party or witness, to whom it is directed, to appear for examination at a time and place to be specified therein, concerning the property of the judgment debtor. Examinations of the debtor, third party and witnesses may be had simultaneously or separately, and the close of one or more of such examinations shall not affect the proceedings not concluded. [Added by L. 1935, ch. 630, in effect Sept. 1.]"

"§ 783. MANNER OF SERVICE OF ORDERS, SUBPOENAS AND WARRANTS.

1. An injunction order, or an order or a subpoena requiring a person to attend and be examined, made as prescribed in this article, must be served by delivering to and leaving with the person named therein, a copy thereof, together with a copy of the affidavit, if any, upon which such order was granted. Service upon a corporation is sufficient if made in the same manner as a summons may be served upon such corporation unless the officer or agent is specifically designated in the subpoena or order, in which case service shall be made upon him. * * *

2. * * * [Added by L. 1935, ch. 630, in effect Sept. 1.]"

"§802. DURATION AND ADJOURNMENT, DISCONTINUANCE DISMISSAL, OR CLOSING OF PROCEEDINGS.

1. A proceeding under this article shall continue until closed or discontinued by consent or

discontinued, dismissed or closed by order of the court; but a proceeding shall be deemed closed two years from the service of the order, subpoena, or warrant whereby the proceeding is instituted unless the court shall make an order extending the proceeding for a definite period. A proceeding shall not be deemed closed or abandoned by reason of any irregularity upon an adjournment. Any proceeding may be adjourned from time to time by consent or by the court or referee as it or he may deem proper. Where an adjournment has been had without date, the court or referee may fix a date for the continuation of the said examination of the debtor, third person or witness.

2. A proceeding hereunder upon application of the creditor may be discontinued at any time. A proceeding under this article shall be deemed dismissed or closed upon the satisfaction or vacation of the judgment and an order may be entered thereon.

3. A proceeding under this article may be closed by order of the court where the judgment creditor unreasonably neglects or delays to proceed, upon the application of the judgment debtor or third person, or of the plaintiff in a judgment creditor's action against the debtor. The court or referee shall close a proceeding, under this article upon the completion of the examination of the debtor, or of any third person, and of the witnesses.

4. The court may impose costs as provided in section eight hundred and three of this article." (Added by L. 1935, ch. 630, in effect Sept. 1.)

The sections applicable to the service of process in this proceeding are found in the **New York Civil Practice Act** (L. 1920, Ch. 925), as follows:

> "§ 218. SUMMONS GENERALLY. A civil action is commenced by the service of a summons, which is a mandate of the court. Rules may be made respecting the requisites and form of a summons and notice and endorsements thereon."

> "§ 225. PERSONAL SERVICE OF SUMMONS UPON A NATURAL PERSON. Personal service of the summons upon a defendant being a natural person must be made by delivering a copy thereof within the state as follows:

> 1. * * *

> 2. * * *

> 3. In any other case, to the defendant in person."

> "§ 403. ISSUANCE OF SUBPOENA. A subpoena is a process in the name of the court, referee, body or other person authorized by law to issue the same, requiring the attendance of a witness at the trial or hearing of a cause or the hearing of a motion or before a referee or other person where proof or the production of books, papers or other documents is required."

A special proceeding is defined in the **New York General Construction Law** (Cons. Laws, Ch. 22, 1909, as amended by L. 1920, Ch. 917) as follows:

> "§ 46-a. SPECIAL PROCEEDING. Every prosecution by a party against another party in a court of justice which is not an action is a special proceeding."

The **New York Rules of Civil Practice** (adopted pursuant to L. 1920, Ch. 902, as amended by L. 1921, Ch. 370) applicable in this proceeding reads:

> "Rule 21. MANNER OF SERVICE OF PAPERS TO BEGIN A PROCEEDING. The provisions of the statutes and rules relating to the mode of personal service of a summons shall apply to the service of any process or other paper whereby a proceeding is begun in a court, or before an officer, except a proceeding to punish for contempt, unless other special provision for the service thereof is made by law or rule. Other papers in a proceeding shall be served in like manner as in an action."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 23.

WILLIAM FOX,

Petitioner,

vs.

CAPITAL COMPANY, a California corporation,

Respondent.

REPLY BRIEF OF PETITIONER.

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The award of $10,000 as costs was made utterly without power or authority in law and in disregard of the plain provisions of the governing statutes. It is in fact an unwarranted additional penalty imposed under the guise of costs.

Respondent has failed to answer petitioner's Points A and B. Instead, the principal contention of the respondent seems to be that an award of costs incidental to an order of the District Court does not make such order final or appealable. This is not invariably true as pointed out by Mr. Justice Taft in the case of *Newton* v. *Consolidated Gas Co.* (1923), 265 U. S. 78, at page 83, as follows:

> "When the power of the court to assess costs against either party is *not* in dispute, or the mere amount to be fixed is in issue, appeals on such questions alone are not allowed. *But the rule*

is not absolute and should not be enforced when the trial court assumes the power to assess as costs against a fund or a party expenditures of a class not legally assessable as such. Where a question of this kind is made, appeals have been allowed. Thus, in *Trustees* v. *Greenough,* 105 U. S. 527, an appeal was allowed from a decree in equity solely for costs when the question was whether they could be properly paid out of a fund in the control of the court. So in *In Re Michigan Central R. R. Co.,* 124 Fed. 727, an intervener was allowed to appeal from a decree of a trial court, allowing costs in favor of the clerk, *when it was objected that neither by statute nor general law could such costs be allowed by the court in favor of the clerk.* The question is fully considered by the Circuit Court of Appeals of the Sixth Circuit in an opinion by Judge Lurton, afterwards Mr. Justice Lurton, of this court. *The many cases cited in which appeals from decrees for costs had been denied were distinguished as involving a question not of positive law, but of discretion.* We think the distinction made in that case a sound one, and that, as the question is here presented, the appeal is a proper one." (Italics ours.)

It will be noted that this Court has held an order to be reviewable by an appellate court, "when the trial court assumes the power to assess as costs against a party expenditures of a class not legally assessable as such"; and that such question is a question of "positive law". This is precisely the situation in the case at bar.

The respondent at page 6 of its brief, as well as in its counsel's affidavit submitted to the District Court on the settlement of the order punishing for contempt (R. 41), contends that the sum of $10,000

is properly assessed by virtue of Section 803(1) of the New York Civil Practice Act (Laws of New York, 1935, Ch. 630, Sec. 1, p. 1276) (Appendix, *infra,* p. 13). That section is wholly inapplicable. The section applicable to a contempt in proceedings supplementary to judgment is definitely fixed by the Act itself (Section 801).

Section 801 of the New York Civil Practice Act (Laws of New York, 1935, Ch. 630, Sec. 1, p. 1275) (Appendix, *infra,* p. 13), specifically provides for the punishment for disobedience of an order or a subpoena, in proceedings supplementary to judgment. It provides that the punishment for contempt in this case is governed by Section 753 and Section 773 of the Judiciary Law (Laws of New York, 1909, Ch. 35, Secs. 753, 773, pp. 357, 395) (Appendix, *infra,* pp. 13-14).

> *Williamson* v. *Drogaris, et al.* (not officially reported), 288 N. Y. Supp. 179 (App. Div. 1936);
>
> *Consumer's Poultry Dealers Corporation* v. *Podberesky Bros., Inc.,* 244 App. Div. 754 1935);
>
> *Weddle* v. *Grzeczezak,* 189 App. Div. 493 (1919).

The *only* costs allowed by the statute on a motion for contempt are costs and disbursements of such a motion (Sec. 773 of the Judiciary Law). The case of *Burton* v. *Jurgensen,* 138 N. Y. Misc. 69 (1930), is directly in point. The Court in that case, held as follows:

> "Under the provisions of the Judiciary Law, I adjudge the defendant Henry Jurgensen in contempt of court, and, under the authority of sec-

> tion 773, will impose upon him a fine of the amount of the judgment with interest to the date of the order and in addition fifty dollars and *the actual disbursements paid by the plaintiff on account of this proceeding*" (p. 72). (Italics ours.)

Likewise, the respondent, in its brief, at pages 4 and 5, quotes from the case of *Doyle* v. *London Guarantee & Accident Company, Limited* (1907), 204 U. S. 599, as follows:

> "if they produce the cash book alone, they are ordered to pay no more than the *costs accruing upon this motion,* including the stenographer's charges on or before January 20th, or in default of such payment, to be imprisoned for 60 days" (204 U. S. at p. 602). (Italics ours.)

It will be noted that the costs therein are costs "accruing upon this motion" which can only mean the motion to punish for contempt.

The fine and penalty to be imposed as provided by the judiciary law, are the actual damages referable to non-compliance with the process of the Court or a fine of $250 together with costs and necessary disbursements. The costs of a motion in New York State are fixed by the Civil Practice Act, Section 1505 (Laws of New York, 1932, Ch. 260, §1, p. 641) (Appendix, *infra,* p. 14) amounting to $10. Therefore it will be seen that the allowance of $10,000 under the guise of costs, is a penalty wholly unauthorized by any law or statute.

The affidavit of counsel for the respondent enumerates the items upon which it predicates its demand for costs. It reads as follows:

> "To recapitulate, the fair and reasonable value

of services and the disbursements paid out or incurred to date are:

Attorneys services in supplementary proceedings	$ 7,675.00
Stenographic cost	570.80
Attorneys services in New Jersey action on judgment	725.00
Attorneys services in Nassau County action to set aside transfer of real estate	100.00
Disbursements in connection with the foregoing	3,049.20
	$12,120.00

"In view of the foregoing facts, it is submitted that an allowance of costs in the maximum amount (5% of the unpaid balance of the judgment, which would amount to $11,754.10 in this case) allowed by statute, in addition to the fine in the full amount of the judgment, *is small punishment indeed* for the contempt of Court of which the judgment-debtor has been found guilty" (R. 48). (Italics ours.)

It will be seen that not one of the items enumerated in this recapitulation are assessable as costs in this proceeding, and *there is no statute or general law which permits a court to fine a delinquent five per centum of the amount of the unpaid balance of a judgment as costs.*

The body of the affidavit enumerates thirty-one separate items of attorneys' services, claimed to be of the value of $7,675 (R. 41, 46). Only seven of these items could have been properly charged as costs on the motion to punish for contempt (R. 43-46) and these seven items constitute only minor items of services directly referable to the alleged contempt itself. No attempt

was made to give an estimate of their value. They were merely grouped among the thirty-one items for which the sum of $7,675 is demanded.

The affidavit of respondent's attorney (R. 34-30) shows that the respondent's attorneys attempted to collect as costs, not only costs of the motion to punish for contempt, but costs, disbursements and attorneys' fees in connection with the entire supplementary proceedings to date, and costs, disbursements and attorneys' fees in connection with an action on the judgment, instituted in the State of New Jersey, and costs, disbursements and attorneys' fees in an action in the Supreme Court of the State of New York, Nassau County, to set aside a transfer of real estate. By no stretch of the imagination could these items be held to be costs. And in no way could detective services in the months of December, 1935 and January, 1936 (R. 50) be charged as disbursements on the motion to punish for contempt, which motion was instituted by order to show cause dated November 1, 1935 (R. 34), and served upon petitioner on November 9, 1935 (R. 3).

In fact, the sum of $10,000 ordered to be paid does not constitute costs at all. It is a mere euphonism to describe it as costs.

The authority to impose costs under Section 803 is found in Section 802(4) (Laws of New York, 1935, Ch. 630, Sec. 1, p. 1276), which reads as follows:

> "The court may impose costs as provided in section eight hundred and three of this article."

An examination of Section 802 (see Appendix, Brief of Petitioner, pp. 48, 49) clearly establishes that the costs allowed under Section 803 are costs to be awarded at the final determination of the proceedings

as provided for in Section 802, and have nothing whatever to do with contempts.

Thus, even a cursory examination of the items clearly demonstrates that the District Court could only have awarded the sum of $10,000 as costs under the erroneous impression that the statutory authority of Section 803 of the New York Civil Practice Act was applicable, and such surely is not the case.

Therefore, it will be seen that the District Court had absolutely no authority to award as costs five per cent. of the judgment or any per cent. thereof. Certainly, the sum of $10,000 is explicable only on the theory upon which it was demanded. In the language of the affidavit, the imposition of five per cent. of the judgment as costs is "small punishment indeed for the alleged contempt" (R. 48). *That is an additional penalty, wholly unauthorized by any law.*

Nowhere is there a word in these papers showing the reasonable value of services in the contempt proceeding, nor was the allowance made on the theory that Section 773 of the Judiciary Law was applicable. The allowance was claimed, demanded and granted on the fallacious theory that the Court had the power to add up to five per centum of the judgment as costs regardless of the services that may have been performed in the contempt proceeding and regardless of the value of said services. Viewed in that light, it will be seen that *this is an adjudication as a penalty wholly outside the court's power and calling it or labeling it "costs" does not change its true nature.*

The respondent contends that if an appeal should be heard by the Circuit Court of Appeals and if the determination of that court were in favor of the respondent, the petitioner would have a second oppor-

tunity to test the jurisdiction of the District Court by writ of *habeas corpus,* when and if he be arrested. There are two answers to that proposition. In the first place granting that the Circuit Court of Appeals, in the event of an arrest, could review the orders by writ of habeas corpus, such a possibility cannot deprive that court of its jurisdiction to review the orders herein. In the second place, it seems implausible that present day procedure should demand that one suffer the indignity of being incarcerated in order to test the District Court's jurisdiction over his person if an appeal would accomplish the same result without the unnecessary accompanying humiliation.

Is it not more in consonance with our modern method of procedure that the invalidity of an order should be tested by appeal, and not by disobedience as counsel for the respondent suggests? Clearly proceeding by appeal is not only correct, but also more in agreement with our present day practice.

The petitioner has not extended his argument beyond the scope of the writ of certiorari.

The respondent's second contention, at page 8 of its brief, expresses a belief that the petitioner has attempted to circumvent the order of this Court which granted certiorari, dated May 18, 1936 (R. 97). That criticism necessarily invites petitioner to show that the claim of lack of power of the District Court is a substantial, solid claim, fortified by an imposing line of authority, and the precise language of the statutes. The material in the petitioner's brief on this point does not invite a decision by this Court on the merits of the controversy, but merely shows the substantial

character of the controversy, and thus within the doctrine of *Phillips* v. *Negley,* 117 U. S. 665, *The Farmers Loan and Trust Co., Petitioner,* 129 U. S. 206, and *City of Eau Claire* v. *Payson,* 107 Fed. 552, the petitioner is justified in bringing in the matter criticized by the respondent. This was no "ingenious device" to secure a review by this Court as to the basic controversy. Such a statement is utterly without foundation. What the petitioner has done is merely to set forth all the matters the petitioner believes necessary and material to aid this Court in reaching the conclusion that the Circuit Court of Appeals has jurisdiction to entertain the petitioner's appeal, and nothing more.

The petitioner here is in the same position as the petitioner in *The Farmers Loan and Trust Company, Petitioner,* 129 U. S. 206, in which this Court granted a writ of mandamus to allow an appeal from an order which determined the rights of parties in a receivership. The last lines of the quotation from this Court's opinion, found at page 16 of the petitioner's brief, read as follows:

> *"In granting the appeal this court, of course, does not undertake to decide whether the order was rightfully made, if the court had the requisite power, but can only do that upon the hearing of the appeal"* (129 U. S. 206, 216). (Italics ours.)

The petitioner is praying that this Court merely order the Circuit Court of Appeals to determine whether or not the District Court had the requisite power to render the orders herein. And just as the question of power was raised in *The Farmers Loan and Trust Co., Petitioner,* case (*supra*), it became incumbent upon the petitioner herein to raise the question of power in this case.

At page 9 of respondent's brief, is found a number of cases showing that orders denying motions to dismiss a proceeding or to quash service of process for want of jurisdiction over the person of the defendant are not appealable. In those cases, a trial and judgment follow the denial of the motion, and the jurisdictional point is reserved and may be raised on appeal after judgment is entered. With that the petitioner has no quarrel; but wherein will there be any judgment in this proceeding?

The termination of proceedings supplementary to judgment in this case is governed by Section 802 of the New York Civil Practice Act. To await the outcome of the proceedings pursuant to Section 802, as suggested by respondent, would put the petitioner in a situation in which, as set forth in Point A, there would be no adequate relief without recourse to an appeal at this time, as in the receivership cases therein discussed.

At page 13 of respondent's brief, is a discussion of the cases of *Doyle* v. *London Guarantee & Accident Co., Limited* (1907), 204 U. S. 599 and *Matter of Christensen Engineering Co.* (1904), 194 U. S. 458. As to these cases, petitioner reiterates that the distinguishing feature in the instant proceeding is that there will be no judgment from which an appeal can be taken. All the Court may order is a termination of the proceeding without any adjudication although the testimony taken may be used at any time in appropriate applications. The point is that there may be no final decision in proceedings supplementary to judgment.

Section 802 of the Civil Practice Act (see Appendix, Brief of Petitioner, p. 49) provides not only

for termination by consent or order of the court, but also that the proceeding shall be deemed closed automatically two years from the date of the service of the subpoena, unless the court shall make an affirmative order extending the proceeding for a definite period.

It will thus be seen that no reviewable order, decision or decree of the court may ever be made. This is the capital distinction between merely intermediate orders punishing for contempt, as in the *Doyle* case (*supra*) wherein the case could be tried and judgment rendered, from which an appeal could be taken, and the instant proceeding.

Thus, there is no parallel between the *Doyle* case which involved an examination of books before trial in an action of *assumpsit* and proceedings supplementary to judgment which may be terminated without the entry of any decision.

As to the cases of *Steinman* v. *Conlon* (1913), 208 N. Y. 198 and *Hand* v. *Ortschreib Building Corporation* (1930), 254 N. Y. 15, merely a word is necessary. There is a great distinction between Section 588(5) of the New York Civil Practice Act, and Section 225 of Title 28, United States Code, both as to the words employed and the judicial interpretations thereof. It is enough to say that the jurisdiction of the Circuit Court of Appeals has been definitely settled by a long line of controlling authority as shown in Point A of petitioner's brief. The limitations in the jurisdiction of the Court of Appeals can have no bearing upon this inquiry.

Furthermore, the Court of Appeals of the State of New York is fully justified in its decisions in the *Steinman* and *Hand* cases (*supra*) because a review

by the Court of Appeals would mean a second appellate review, as the appeals were from orders of the Appellate Division of the Supreme Court, whereas the petitioner in the instant proceeding is seeking but a first review by an appellate court; that is, the Circuit Court of Appeals.

At page 15 of the respondent's brief, the argument under Point III is emphasized by this language:

> "If the mere existence of a contention by an appellant that the lower court has exceeded its jurisdiction makes an interlocutory order appealable, then the order in this case was appealable and Respondent will make a proper answer on the merits in the Circuit Court of Appeals as it did in the District Court."

The answer to the respondent is that so far as the imposition of the costs is concerned, the order is definite, final and immediate, and, therefore, within the doctrine of innumerable cases considered in Points A and B of petitioner's brief. It is a *final order,* not interlocutory, as asserted. Secondly, if such final order, as contended, was made without power in the Court to make it, and if the imposition of a penalty under the guise of costs without judicial or statutory authority is involved, then by classical precedent, it is reviewable.

Respectfully submitted,

BENJAMIN REASS,
Counsel for Petitioner.

DANIEL G. ROSENBLATT,
JACK G. MARKS,
On the Brief.

Appendix.

The additional sections of **Article 45 of the New York Civil Practice Act** are, as follows:

"Sec. 801. *Punishment for disobedience of order or subpoena.* A person who refuses or without sufficient excuse neglects to obey an order or subpoena issued pursuant to any provision of this article and duly served upon him, or any order made or oral direction given directly to him, by a judge or referee, in the course of the special proceedings, or who violates the provisions of section seven hundred eighty-one endorsed upon the subpoena served upon him, may be punished for contempt, as provided in the judiciary law, by the court in which such proceeding is pending or by the judge who made such order or the court from which was issued the order or subpoena or before whom or which such order or subpoena was returnable."

"Sec. 803. *Costs.* 1. The court or judge may make an order allowing to the judgment creditor a fixed sum as costs, consisting of his witnesses' fees and other disbursements, including referee's fees, and of a sum in addition thereto not exceeding five per centum of the judgment but where such additional sum is under fifty dollars, the court may allow a sum not to exceed fifty dollars. The court may direct the payment thereof out of any money which has come or may come into the hands of the receiver or sheriff; or, within a time specified in the order, by the judgment debtor.

"2. * * *."

The applicable sections of the **Judiciary Law of the State of New York,** read, as follows:

"Sec. 753. *Contempts punishable civilly.* A

court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in either of the following cases: * * *

1. * * *; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge."

"Sec. 773. *Amount of fine.* If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section."

The applicable section of the **New York Civil Practice Act,** in reference to costs on a motion, is as follows:

"Sec. 1505. *Amount of costs upon a motion or reference.* Costs awarded to either party to an

action upon any motion, other than for a new trial upon a case or for judgment upon a special verdict, or upon a reference specified in section fourteen hundred and eighty-six of this act, to each party to whom costs are awarded, a sum fixed by the court or judge, not exceeding ten dollars, besides necessary disbursements for printing and referee's fees; except that upon appeal to the appellate division of the supreme court, costs may be awarded not exceeding fifty dollars besides necessary disbursements for printing."

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Supreme Court of the United States

October Term, 1935

Nos. ~~893 and 894~~

WILLIAM FOX,
Petitioner,

against

CAPITAL COMPANY, a California corporation.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
SAMUEL B. STEWART, JR.,
Counsel for Respondent.

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Supreme Court of the United States

October Term, 1935

Nos. 893 AND 894

WILLIAM FOX,
Petitioner,

against

CAPITAL COMPANY, a California corporation.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Questions Presented

The motion and petition present two questions:

(1) On the merits: Whether a judgment debtor sought to be examined as to his assets by a judgment creditor in the effort to collect a judgment, is not a "witness" within the meaning of the statute (28 U. S. C. § 654) which provides that "subpoenas for witnesses" may be served within one hundred miles from the court house;

(2) As to the appealability of a contempt order in supplementary proceedings prior to termination of the supplementary proceedings: Whether, where a fine for contempt is imposed in two parts, one for the amount of the judg-

ment, and the other for costs in seeking to enforce the judgment, and a provision is made that the contempt may be purged in respect of the first, but that the second must be paid by the judgment debtor in any event, there is a final order appealable as of right.

Statement

Respondent holds a judgment in the amount of $297,412.91 against William Fox, entered in the United States District Court for the Southern District of New York, on July 18, 1935 (R. 7). William Fox has been evading payment of the judgment. Respondent's attorneys have been engaged in extensive and diligent efforts to locate and serve petitioner, who has been obviously evading service (R. 36-40; 7-11)[1]. Service was effected on petitioner at the railroad station at Frankford Junction, Pennsylvania, concededly within one hundred miles of the court house (R. 2-3; 7). Upon petitioner's defiance of the subpoena, the District Court entered two orders, the first adjudging petitioner in contempt, and the second directing him to pay (1) $235,082.03, representing the unpaid balance due upon the judgment and interest, and (2) $10,000 as costs in supplementary proceedings, representing fees and disbursements of respondent's attorneys in the efforts to locate and serve petitioner (R. 27-30; 54-56). As to the $235,082.03, the order permitted the petitioner to purge himself of the contempt by appearing and testifying (R. 56). Appeals from both orders were dismissed by the Circuit Court of Appeals for the Second Circuit (R. 80; 95).

---

[1]Indeed, service was once before effected on petitioner (at Atlantic City), but was set aside on the ground that Atlantic City was more than 100 miles from the court house (R. 38).

ARGUMENT

POINT I

THE SUBPOENA DEFIED BY THIS JUDGMENT DEBTOR WAS DULY AND PROPERLY SERVED.

The first question,—whether the statute applies,—appears to us to be answered by the plain language of the statute itself (28 U. S. C. § 654):

> "* * * subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into another district; *provided* That in civil cases the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same."

This statute has been expressly held to apply to subpoenas issued in supplementary proceedings in the Federal Courts of New York State. *Meyer* v. *Consolidated Ice Co.*, 163 Fed. 400 (E. D. N. Y., 1908). The case cited is a direct authority for this point, and has been followed without question by the bar for 28 years. The Court said in part, at p. 404:

> "* * * inasmuch as the subpoenas of the United States courts are especially given authority *within a radius of 100 miles*, in civil cases, it does not seem that this court should limit the right of subpoena in a particular kind of case, because of similarity of legislation in the State of New York, when the New York statute is not expressly applicable." [Italics ours]

For the purposes of the statute, a witness has been deemed to live where he is found and served.[2] *Mut. Ben. Life Ins. Co.* v. *Robison,* 58 Fed. 723, 732 (C. C. A. 8th 1893); *Seiden* v. *Concordia Fire Ins. Co. of Milwaukee,* 49 Fed. (2nd) 474 (S. D. N. Y. 1931). Of course, in the present case it makes little difference whether the word "live" means place of temporary sojourn or place of permanent domicile, for this judgment debtor has always been domiciled in New York, having a place of residence in the Borough of Manhattan, City of New York, which is in the Southern District of New York, and another place of residence in the County of Nassau in the Eastern District of New York (R. 9).

The suggestion that the word "witness" in the statute applies against a third party witness in supplementary proceedings, but does not apply against the judgment debtor himself when required to testify as to his property, is obviously unsound.

In New York State, judgment debtors are required to testify[3] pursuant to "subpoena", by the express terms of Section 774 of the Civil Practice Act, which provides that supplementary proceedings may be instituted on the part of a judgment creditor,

> "(1) By order of the court.
>
> "(2) By subpoena of the judgment creditor's attorney, served upon the judgment debtor, a third party or a witness.

---

[2]Petitioner does not argue to the contrary.

[3]It would seem that the very definition of "witness" would be "one who is required to testify." *Bouvier's* Law Dictionary (ed. 1914) explains that the word "witness" derives from the Anglo-Saxon *witan* ("to know"), and citing Greenleaf on *Evidence,* gives the simple definition, "One who testifies to what he knows".

"(3) By warrant issued as in this article provided."

This proceeding was instituted by the second method (R. 1-3).

Whether the supplementary proceeding is, as its name implies, incidental and supplementary to the main proceeding, or is an entirely independent proceeding (as petitioner argues), need not be considered. It is in any event a proceeding instituted by subpoena, and the United States statute provides the territorial limits of the United States District Court's jurisdiction in respect of the service of the subpoena.

POINT II

THE AWARD OF COSTS DID NOT MAKE THE CONTEMPT ORDER OF THE DISTRICT COURT FINAL OR APPEALABLE. DISMISSAL BY THE CIRCUIT COURT OF APPEALS WAS THEREFORE PROPER.

The suggestion that that part of the fine which represents fees and disbursements of respondent's attorneys, awarded to them as costs in the supplementary proceedings, constitutes a final order, appealable as of right, is expressly negatived by *Doyle* v. *London Guarantee & Accident Company, Limited*, 204 U. S. 599 (1907). The defendants were there directed to produce their books and papers by a certain date, or pay a fine of $250 "and also the costs accruing upon this motion, including the stenographer's charges". The petitioner states (Br. p. 20) "that leave to purge was given". This is true of the fine (as in our case), but is untrue as to the costs, for the order expressly provided that:

> "if they produce the cash book alone, they are ordered to pay *no more than* the costs accruing upon this motion, including the stenographer's charges * * *" (204 U. S. at p. 602; Italics ours).

The *Doyle* case was, therefore, in all material respects, like the case at bar.

The petitioner concedes (Br. p. 20) that the supplementary proceedings, in which this contempt order was entered, have not been terminated. Section 802 of the New York Civil Practice Act provides that a supplementary proceeding

> "shall continue until closed or discontinued by consent or discontinued, dismissed or closed by order of the court; but a proceeding shall be deemed closed two years from the service of the order, subpoena or warrant whereby the proceeding is instituted unless the court shall make an order extending the time for a definite period."

In the absence of consent it is obviously contemplated that some "final order" of the court shall be entered, after which any questions raised in supplementary proceedings would be reviewable in the Circuit Court of Appeals. Moreover, if petitioner be committed to custody pursuant to a contempt order not otherwise reviewable, review of the question whether the Court had jurisdiction to make the order will always be open by way of application for a writ of habeas corpus. *Ex Parte Fiske*, 113 U. S. 713.

It is only too clear that the reason for this judgment debtor's very strenuous efforts to raise technical objections in an appeal now, before a "final order" has been entered terminating the supplementary proceedings, is that if he waits he may in the meantime have to pay the judgment

(which he confessed, and from which no appeal has been taken) or to submit, like any other judgment debtor, to an examination respecting his assets. Such reasons, we submit, do not justify the grant of this prerogative writ.

Respectfully submitted,

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
SAMUEL B. STEWART, JR.,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 23.

WILLIAM FOX,
Petitioner,

against

CAPITAL COMPANY, a California corporation,
Respondent.

BRIEF OF RESPONDENT

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
SAMUEL B. STEWART, JR.,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1936—No. 23

WILLIAM FOX,
Petitioner,

against

CAPITAL COMPANY, a California corporation,
Respondent.

BRIEF OF RESPONDENT

The Order To Be Reviewed

The order of the United States Circuit Court of Appeals for the Second Circuit of March 5, 1936, is to be reviewed by this Court only in so far as it dismissed "the appeal from the order of the United States District Court for the Southern District of New York, entered on February 20, 1936." The review is to be limited "to the question of the jurisdiction of the Circuit Court of Appeals." This Court so directed by its order entered May 18, 1936.

This Court, by an order entered on May 18, 1936, denied petitioner's application in so far as petitioner sought writs of certiorari (1) to review the order of the Circuit Court of Appeals dismissing petitioner's appeal from the order of the District Court entered December 19, 1935, and (2) to review on the merits both orders of the District Court (December 19, 1935, and February 20, 1936) which held petitioner guilty of a civil contempt of court and fixed

his punishment therefor. Therefore, to the extent that petitioner's brief argues upon those matters it relates to matters not now subject to review here and such matters will be disregarded by respondent.

Questions Presented

The sole questions presented are:

(1) Does the imposition by the District Court of costs in an order otherwise interlocutory make that order "final" and therefore appealable to the Circuit Court of Appeals?

(2) Does the presence of a question concerning the jurisdiction of the lower court over the person of the petitioner make an interlocutory order appealable?

Statement

Respondent holds a judgment in the amount of $297,412.91 against William Fox, entered in the United States District Court for the Southern District of New York on July 18, 1935 (R. 7). William Fox has been evading payment of the judgment (R. 36-40). Prior to October 8, 1935, respondent's attorneys were engaged in extensive and diligent efforts to locate and serve petitioner, who was obviously evading service (R. 36-40; 7-11.)[1] Service was effected on petitioner on October 8, 1935, at Frankford Junction, Pennsylvania, concededly within one hundred miles of the court house (R. 2-3; 7). Petitioner at that time was maintaining, and for many years prior thereto

[1]Indeed, service was once before effected on petitioner (at Atlantic City), but was set aside on petitioner's motion on the ground that Atlantic City was more than 100 miles from the court house (R. 36).

had maintained, two residences in the State of New York, one in New York City in the Southern District of New York, and the other at Woodmere, Long Island, in the County of Nassau, Eastern District of New York (R. 9, 36). For a few weeks prior to the date of service petitioner had been sojouring at a hotel in Atlantic City, New Jersey (R. 13, 37, 38). Upon petitioner's defiance of the subpoena, the District Court entered two orders, the first[1] adjudging petitioner in contempt and the second[2] directing him to pay (1) $235,082.03, representing the unpaid balance due upon the judgment and interest, and (2) $10,000 as costs in supplementary proceedings, representing fees and disbursements of respondent's attorneys in their efforts to locate and serve petitioner (R. 27-30; 54-56). As to the $235,082.03, the order permitted the petitioner to purge himself of the contempt by appearing and testifying (R. 56). Appeals from both orders were dismissed by the Circuit Court of Appeals for the Second Circuit (R. 80; 95).

SUMMARY OF ARGUMENT

I. An award of costs incidental to an interlocutory order of the District Court does not make such order final or appealable.

II. The mere fact that a question of jurisdiction of the lower court is involved does not make an interlocutory order appealable.

III. The question whether the District Court had jurisdiction over petitioner when the contempt order was made is not before this Court.

---

[1]Entered December 19, 1935; not subject to review under this Court's order of May 18, 1935.

[2]Entered February 20, 1936; jurisdiction of Circuit Court of Appeals to consider appeal from which is subject to review here.

ARGUMENT

POINT I

AN AWARD OF COSTS INCIDENTAL TO AN INTERLOCUTORY ORDER OF THE DISTRICT COURT DOES NOT MAKE SUCH ORDER FINAL OR APPEALABLE.

Petitioner argues in points A, B and E of his brief that since the District Court's order grants him the right to purge himself of the contempt only as to the $235,082.03 and not as to the $10,000 costs imposed by the Court, it is a "final decision" on the matter of costs and reviewable in the Circuit Court of Appeals. Throughout these points petitioner attempts to divert attention from the real nature of this award of costs by referring to it as a "judgment for $10,000", an "order for the immediate payment of $10,000", and an "order for the immediate payment of money".

In the case of *Doyle* v. *London Guarantee & Accident Company, Limited,* 204 U. S. 599 (1907), an almost identical set of facts was presented to this Court and the order was held not appealable. In that case the defendants were directed to produce their books and papers by a certain date, or pay a fine of $250 "and also the costs accruing upon this motion, including the stenographer's charges". As in the instant case, leave was given by the Court to the defendants in the *Doyle* case to purge themselves of their contempt and so relieve themselves of the fine, but no leave to purge was given in so far as costs were awarded, the order expressly providing that:

> "if they produce the cash book alone, they are ordered to pay *no more than* the costs accruing upon

> this motion, including the stenographer's charges on or before January 20th, or in default of such payment to be imprisoned for 60 days." (204 U. S. at p. 602; Italics ours).

This Court's opinion does not indicate the amount of costs that was there involved, nor is there any discussion in the opinion which would indicate that the Court's decision was in the slightest degree dependent upon the amount of costs awarded. Indeed, since the Court there expressly included "the stenographer's charges" it is apparent that the rule of the *Doyle* case was not intended to be limited to cases in which only nominal costs should be allowed, for it is a matter of common knowledge that stenographers' charges in lengthy proceedings frequently run into thousands of dollars. The fact that defendants in the *Doyle* case were ordered imprisoned unless they paid the costs likewise did not make the order appealable. There is no more reason why a similar order should be any more appealable in the present case.

There is no need for petitioner's alleged fear that if an appeal be not now heard by the Circuit Court of Appeals he will rot in jail because of his inability to pay the costs or to obtain a review. If he should be committed to custody pursuant to a contempt order not otherwise reviewable, review of the question of whether the Court had jurisdiction to make the order would always be open by way of application for a writ of habeas corpus. *Ex parte Fiske,* 113 U. S. 713. If an appeal should be heard now and the order affirmed there would be nothing to prevent petitioner from appealing again from a denial of habeas corpus.

If the *Doyle* case should be overruled by this Court the way would be made easy not only for unscrupulous

judgment-debtors but for defendants generally whose sole defense is to delay proceedings until the plaintiff gives up from discouragement and exhaustion. The door would be thrown wide open to dilatory appeals by such parties from every interlocutory order which might be entered upon every matter of pleading, practice or otherwise, however trivial, if only costs be assessed by the District Court against the party seeking such delay.

The costs in the present case are substantial but not excessive. They are considerably less than five per cent. of the amount of the judgment. Yet the statute (New York Civil Practice Act § 803 (1), in effect in the United States District Court for the Southern District of New York under Rule 5 of the Common Law Rules of that Court) authorized costs, in the discretion of the Court, up to five per cent. of the judgment *in addition to* "witnesses' fees and other disbursements, including referee's fees." The disbursements alone in the present case were shown to be in excess of $3,000 at the time of entry of the order awarding costs (R. 47; 49-50). If a judgment-debtor, through evasion and dilatory proceedings, causes heavy expense to a judgment-creditor, justifying a substantial award of costs in connection with an interlocutory order entered in supplementary proceedings, that fact certainly does not require that such judgment-debtor shall be shown special consideration and allowed to prosecute an appeal at a stage of the proceedings when an appeal would not otherwise be allowed. Such a rule could result only in hardship to honest judgment-creditors and plaintiffs while enabling their scheming adversaries to take advantage of their own wrong doing.

There is not one in the dozens of cases cited in petitioner's brief which upholds the appealability of an inter-

locutory order merely because it incidentally (but nevertheless definitely and "finally") awards costs to the prevailing party as an incident to the relief primarily granted. Yet, substantial as the sum of $10,000 is, the award of that sum as costs to the judgment-creditor in this order was patently incidental to the main relief granted, which was an order that a judgment-debtor, whose evasive and dilatory tactics had long thwarted the judgment-creditor and burdened the Court, should now at last testify concerning his assets or pay his adjudged debt of more than $200,000, or, in the event of his refusal to do either, should go to jail until he decided to do one thing or the other.

To allow an appeal from every order awarding costs would without question result in a flood of litigation in the Circuit Courts of Appeals which would seriously impede those Courts in the expeditious handling of appeals involving final determinations of substantial matters upon the merits. This is no doubt the reason why appeals from interlocutory orders generally have not been authorized by statute.

The policy of limiting appeals has long been justified by this Court upon similar reasoning. Very early in the judicial history of this Court the question arose whether this Court had authority to review Circuit Court orders committing witnesses to prison for contempt. In *Ex parte Kearney, 7* Wheat. 38, a petition was presented to the Supreme Court for a writ of habeas corpus to bring up the body of Kearney who was in prison under a commitment of the Circuit Court for an alleged contempt in refusing to answer a question put to him after his objection to it was overruled. The Supreme Court refused the writ on the ground that it had no appellate jurisdiction in criminal

cases. Mr. Justice Story, in delivering the opinion of the Court, said at page 42:

> "* * * undoubtedly the denial of this authority proceeded upon great principles of public policy and convenience. *If every party had a right to bring before this court every case in which judgment had passed against him for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and in some cases totally frustrated.*" (Italics ours.)

POINT II

THE MERE FACT THAT A QUESTION OF JURISDICTION OF THE LOWER COURT IS INVOLVED DOES NOT MAKE AN INTERLOCUTORY ORDER APPEALABLE.

In points C and D of petitioner's brief an ingenious effort is made to secure a ruling by this Court upon the merits of this controversy. This is simply an attempt to circumvent this Court's orders of May 18, 1936, in which writs of certiorari to review the merits were denied and the review was expressly limited to the question of the jurisdiction of the Circuit Court of Appeals to hear an appeal on the merits.

Disregarding the twelve pages of petitioner's brief devoted to a consideration of the merits (pp. 26-38), it will be found that this argument of petitioner is based primarily upon two cases: *Phillips* v. *Negley,* 117 U. S. 665, and *The Farmers Loan & Trust Co., Petitioner,* 129 U. S. 206 (Petitioner's Brief, pp. 23-25).

Petitioner appears to contend that these cases stand for the proposition that any order not only may but *must* be reviewed on appeal if a question is raised concerning the jurisdiction of the Court below to make the order. These cases do not support that proposition and, indeed, there is no such rule.

It is well settled, for example, that appeals do not lie from United States District Court decisions denying motions to dismiss a proceeding or to quash the service of process for want of jurisdiction over the person of defendant.

Pearson v. *Higgins,* 34 Fed. (2d) 27 (C. C. A., 9th, 1929) Cert. denied, 280 U. S. 593;
Trans-Atlantic Trust Co. v. *Pagenstecher,* 287 Fed. 1019 (App. D. C., 1923);
Mellon v. *Mertz,* 30 Fed. (2d) 311 (App. D. C., 1929);
5 LONGSDORF, CYCLOPEDIA OF FEDERAL PROCEDURE, § 2605;
Cf. *Mann* v. *Gaddie,* 158 Fed. 42 (C. C. A., 5th, 1907).

Longsdorf, in the section cited, says:

> "Mere interlocutory rulings as to process which leave the suit unimpaired and undisposed of are not appealable, such, for example, as an order overruling a motion to quash process or service thereof."

Similarly, Chief Justice Martin, in the *Mellon* case, said at page 312:

> "the order overruling the motion to dismiss the bill of complaint was interlocutory only, and was not appealable. *Metzer* v. *Kelly,* 34 App. D. C. 548.

> Nor was the order overruling the motion to quash appealable. * * *"

While the *Pearson* case arose in bankruptcy and, therefore, presented the question in slightly different form, the Court in dismissing an appeal from an order of the District Court denying review of the determination by the Referee in Bankruptcy that the bankruptcy court had jurisdiction in a summary proceeding to hear the issue of title and possession of a boat, commented appropriately at page 28:

> "In an ordinary case at law or in equity, an order overruling an objection to the court's jurisdiction is not appealable; and no more is a like order in a bankruptcy proceeding. * * * Appellate courts do not sit to anticipate possible grievances or to try out controversies in piece-meal."

Since petitioner's argument that the District Court did not have jurisdiction is based upon an attempted analogy between the manner in which a summons to institute an action must be served and the manner in which a subpoena in supplementary proceedings must be served, these authorities are extremely pertinent in the present case.

It is, of course, fundamental that if an order is appealable, whether because it is a "final order" or because an appeal is expressly authorized by statute, one of the questions which will be considered on the appeal is the question whether the Court below had jurisdiction to make the order appealed from.

Cases such as *Phillips* v. *Negley*[1] and *The Farmers Loan & Trust Co., Petitioner,*[2] merely illustrate this fundamental principle. Both involved "final orders". In the *Phillips* case the lower court had granted a motion to vacate a

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[1]117 U. S. 665.
[2]129 U. S. 206.

judgment several years after the entry of the order appealed from. This was unquestionably a "final order". The Court makes the point that if the judgment had been vacated at the same term at which it was entered, the order would not have been "final" or appealable, but that having been made at a subsequent term, it was both "final" and appealable.

The distinction is this: Where a motion to vacate a judgment is made at the term at which the judgment was entered, it is a part of the same proceeding in which the judgment was entered, which proceeding cannot then be terminated until after the new trial; the order vacating the judgment is, therefore, necessarily interlocutory. Where no motion is made at the same term, however, the judgment becomes final, and any motion subsequently made necessarily partakes of the nature of a new proceeding which, in turn, is terminated by the order granting or denying the motion. This distinction was drawn by this Court in the case of *Hume* v. *Bowie*, 148 U. S. 245 (1893). There the Court had before it a motion to dismiss a writ of error for want of jurisdiction upon the ground that the order brought before the Court by the writ was not "final". The order in question had been entered after the legal expiration of the term at which the judgment was entered. The term, however, had been extended by order of the Court until after the date when the order was entered. This Court dismissed the writ of error, distinguishing the *Phillips* case in the following language at page 255:

> "The distinction between *Phillips* v. *Negley*, 117 U. S. 665, and this case is, that there a verdict and judgment had been taken against the defendant and no motion was made or proceeding had at that term for the purpose and with the view of setting aside

> the judgment. The litigation was at an end upon the adjournment of the term and the successful party discharged from further attendance."

The case of *S. M. Hamilton Coal Co.* v. *Watts,* 232 Fed. 832 (C. C. A. 2d, 1916), cited by petitioner at page 38 of his brief involved a situation identical with that involved in the *Phillips* case. To the same effect also is the case of *City of Manning* v. *German Ins. Co.,* 107 Fed. 52 (C. C. A. 8th, 1901), cited by petitioner on page 39 of his brief.

Similarly in *The Farmers Loan & Trust Co.* case[1] the first question to which this Court addressed itself in its opinion was the question whether the order appealed from had that degree of "finality" requisite to appealability. After stating its views as to the nature of the rights determined by the order of the Court below and the impossibility of obtaining a review of such rights except upon the appeal there taken, the Court said at page 214:

> "If this view of the subject be correct, of which we entertain no doubt, *the order is a final one.*"

Then, having already determined that the order was final and appealable, the Court proceeded to consider the jurisdictional question.

The cases of *Motion Picture Patents Co.* v. *Steiner et al.,* 201 Fed. 63 (C. C. A. 2nd, 1912) and *Newton* v. *Consolidated Gas Co.,* 265 U. S. 78 (1923), cited by petitioner (Brief, pp. 38-39), are likewise distinguishable from the present case in that both involve appeals from final judgments or decrees. While the power of the lower court in each case to award a particular kind of costs was in ques-

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[1]129 U. S. 206.

tion, there is nothing in either case to indicate that such awards would have been subject to review before final decree or otherwise than as incidental to final decree.

As indicated in Point I, it is clear that a civil contempt order does not become "final" for the purpose of determining appealability until the denial of an application for a writ of habeas corpus. In addition to the case of *Doyle* v. *London Guarantee & Accident Co. Ltd.*, 204 U. S. 599 (1907), cited in Point I, the same principles as to the appealability of contempt orders were enunciated by this Court in *Matter of Christensen Engineering Company*, 194 U. S. 458 (1904). In that case the Court regarded the fact that the fine was payable one-half to the United States as establishing the character of the proceeding as criminal rather than civil, but nevertheless said, after discussion of a group of earlier cases:

> "These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree." (pp. 460-461.)

Cases in the New York State courts have likewise uniformly held contempt orders to be unappealable under a New York statute (Civil Practice Act § 588 and its predecessor) similar in language to the Federal statute (28 U. S. C. A. § 225) defining the jurisdiction of the United States Circuit Court of Appeals:

> *Steinman* v. *Conlon*, 208 N. Y. 198 (1913);
> *Hand* v. *Ortschreib Building Corporation*, 254 N. Y. 15 (1930).

Both of these decisions by the highest court of the State of New York are directly in point as both involved contempts in supplementary proceedings.

The mere fact that the Circuit Court of Appeals for the Second Circuit appears once to have reviewed a contempt order in a case* in which the lack of jurisdiction to consider the appeal was not pointed out to the Court by counsel and was not mentioned in the Court's opinion (Petitioner's Brief, Point D) is certainly entitled to very little weight in opposition to the contrary holding of this Court in *Doyle* and *Christensen* cases, which were followed by this same Circuit Court of Appeals in this very case when counsel for this respondent brought them to the Court's attention.

POINT III

THE QUESTION WHETHER THE DISTRICT COURT HAD JURISDICTION OVER PETITIONER WHEN THE CONTEMPT ORDER WAS MADE IS NOT BEFORE THIS COURT.

In view of the clear language of this Court's order of May 18, 1935, limiting the review herein to the question of jurisdiction of the Circuit Court of Appeals to hear an appeal, the only excuse which Petitioner could have for using more than one-fourth of his brief in this Court to argue the merits of his contention that the District Court had no jurisdiction to punish him for contempt, is a contention that interlocutory orders involving jurisdictional questions are appealable if the lower court has *mistakenly* determined that it had jurisdiction but are not appealable

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**McCall Co.* v. *Bladworth*, 290 Fed. 365 (C. C. A. 2d, 1923).

if that court's determination of its own jurisdiction is correct. In other words, Petitioner is forced into the position of contending that an appeal will be heard in such cases only if the appellate court is going to reverse, or, in effect, that the merits of the appeal must be determined upon a motion to dismiss the appeal. Neither reason nor precedent requires such an illogical ruling.

If the mere existence of a contention by an appellant that the lower court has exceeded its jurisdiction makes an interlocutory order appealable, then the order in this case was appealable and Respondent will make a proper answer on the merits in the Circuit Court of Appeals as it did in the District Court. If the mere existence of such a contention is not sufficient, as we submit (and the authorities cited in Point II hold) it is not, to make an interlocutory order appealable, this Court should affirm the decision of the Circuit Court of Appeals dismissing the appeal in this case, and no consideration of the merits of the District Court's order will be necessary unless and until it shall be raised in the usual and ordinary way upon an application by the Petitioner for a writ of habeas corpus.

CONCLUSION

It is therefore respectfully submitted that the order of the United States Circuit Court of Appeals for the Second Circuit, dated March 5, 1936, was correct and should be affirmed.

Respectfully submitted,

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SAMUEL B. STEWART, JR.,
Counsel for Respondent.

APPENDIX

Common Law Rule 5 of the United States District Court for the Southern District of New York provides:

> "In Common Law causes the parties shall be entitled to the same rights and remedies as respects attachments against the property of the defendant, and as respects, proceedings supplementary to execution, as are now or may be hereafter provided by the laws of the State of New York, which laws (in respect of Common Law causes) are hereby adopted."

Subdivision 1 of Section 803 of the New York Civil Practice Act provides:

> "§ 803. *Costs.* 1. The court or judge may make an order allowing to the judgment creditor a fixed sum as costs, consisting of his witnesses' fees and other disbursements, including referee's fees, and of a sum in addition thereto not exceeding five per centum of the judgment but where such additional sum is under fifty dollars, the court may allow a sum not to exceed fifty dollars. The court may direct the payment thereof out of any money which has come or may come into the hands of the receiver or sheriff; or, within a time specified in the order, by the judgment debtor."

28 U. S. C. A. § 225 (Jud. Code § 128) in so far as relevant to this proceeding provides:

> "(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Section 588 of the New York Civil Practice Act, in so far as relevant to this proceeding, provides:

"§ 588. *Jurisdiction of the court of appeals in civil actions and proceedings.* Appeals may be taken to the court of appeals in civil cases and proceedings as follows:

"1. As of right from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding * * *."

SUPREME COURT OF THE UNITED STATES.

No. 23.—October Term, 1936.

William Fox, Petitioner, *vs.* Capital Company, a California corporation, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[November 9, 1936.]

Mr. Justice Cardozo delivered the opinion of the Court.

The question in this case is whether there is jurisdiction in the Circuit Court of Appeals to review upon appeal an order fining a judgment debtor for contempt in refusing to submit to an examination in proceedings supplementary to judgment.

Respondent had a judgment against petitioner for $297,412.91 in the United States District Court for the Southern District of New York. Upon default in payment, the creditor began a proceeding, supplementary to the judgment, for the examination of the debtor. By the Civil Practice Act of New York (section 774 as amended by l. 1935, c. 630) such a proceeding may be instituted by order of the Court, by subpoena, or by warrant. Respondent resorted to the second of these methods. The judgment debtor having failed to respond to the subpoena, an application was made to punish him for contempt. The Court made an order adjudging the contempt with leave to the debtor to purge himself thereof. Thereafter, upon evidence that the contempt continued, the court made a second order fining the debtor for his contempt in the amount of $235,082.03, then unpaid upon the judgment, and an additional amount of $10,000 to be paid to the attorneys of the judgment creditors for the costs of the proceeding. A warrant was to issue to the Marshal whereby the debtor was to be confined in jail until payment of the fine, with the proviso, in substance, that except for the costs of the proceeding, $10,000, the fine would be remitted upon submission to the subpoena. From the two orders so made the debtor appealed to the Circuit Court of Appeals for the Second Circuit, where the appeal was dismissed. To settle the practice in a situation likely to

recur, this Court granted certiorari, the review to be "limited to the question of the jurisdiction of the Circuit Court of Appeals."

A proceeding for the examination of a debtor as a supplement to judgment or execution is a summary substitute for a suit in equity by a creditor for the discovery of assets. *Ex parte Boyd*, 105 U. S. 647, 651-653; *Le Roy* v. *Rogers*, 3 Paige Ch. (N. Y.) 234; *Hadden* v. *Spader*, 20 Johns. (N. Y.) 554, 565; *Scoville* v. *Shed*, 36 Hun (N. Y.) 165, 167. It continues "until closed or discontinued by consent or discontinued, dismissed or closed by order of the court". New York Civil Practice Act, § 802 (1); *Matter of Steinman* v. *Conlon*, 208 N. Y. 198; *Hand* v. *Ortschreib Building Corporation*, 254 N. Y. 15. It "shall be deemed closed two years from the service of the order, subpoena or warrant" initiating it, unless extended by order for a definite period. § 802 (1). It may be closed within that time upon a showing by the debtor of unreasonable delay. § 802 (3). The relief appropriate to the proceeding includes the appointment of a receiver, or a decree for the payment of money or the delivery of property. *Matter of Steinman* v. *Conlon, supra*, p. 202. The imposition of a fine for the refusal of the debtor to appear or answer is not a substitute for such relief or for adequate discovery. Despite the contempt or the penalties therefor, the proceeding may continue until its aim has been achieved.

The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt. *Doyle* v. *London Guarantee & Accident Co., Ltd.*, 204 U. S. 599; *Matter of Christensen Engineering Co.*, 194 U. S. 458; *Hayes* v. *Fischer*, 102 U. S. 121; *Worden* v. *Searls*, 121 U. S. 14, 25. The appellant in the court below, the petitioner before us here, was a party to a suit or proceeding for the discovery of assets. There is no occasion to consider how far his rights and remedies would be different if he had been a stranger to the record, a witness or an adverse claimant. *Nelson* v. *United States*, 201 U. S. 92, 115; *Alexander* v. *United States*, 201 U. S. 117, 122. Not only was he a party; he was a party to a proceeding then in its initial stages. Discovery was in abeyance, and what the final relief would be was still a subject for conjecture. This sufficiently appears from the statement already made as to the function and duration of a proceeding supplementary to judgment. Finally, the

contempt charged and adjudicated was not criminal, but civil; reparation to an obstructed creditor, not vindication of the public justice, was the purpose of the fine, and of the fine in all its parts. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441; *Doyle* v. *London Guarantee & Accident Co., supra*, p. 606; *Lamb* v. *Cramer*, 285 U. S. 217, 220; *In re Guzzardi*, 74 F. (2d) 671, 672. If this could otherwise be doubtful, it is made clear beyond cavil by the recitals of the order.

Petitioner does not question the compensatory or civil quality of so much of the fine as may be avoided at any time by obeying the subpoena. He takes the ground, however, that the fine of $10,000 which was imposed unconditionally, is in excess of any damage suffered by force of the contempt (*Cf.* 28 U. S. C. §387), and from this he moves to the conclusion that the penalty was inflicted as retribution for a crime. But the conclusion does not follow though the premise be accepted. The court may have erred in its assessment of the costs required for reparation. As to that we do not intimate an opinion either one way or the other. What is very plain is the fact that the assessment was made in a genuine endeavor to reimburse a harassed creditor for the damages occasioned by obstruction and delay. Errors, if there were any, did not split the controversy into parts, one civil and one criminal. *Cf. Collins* v. *Miller*, 252 U. S. 364, 370. It retained from first to last its unitary quality. In levying the fine, the court was not acting *sua sponte*, or at the instance of the government through a prosecuting officer. *Gompers* v. *Bucks Stove & Range Co., supra; Lamb* v. *Cramer, supra; Union Tool Co.* v. *Wilson*, 259 U. S. 107, 112; *Michaelson* v. *United States*, 266 U. S. 42, 64; *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U. S. 448, 452. It lent a helping hand to a suppliant for aid.

The order is not final, and there is no error in the ruling that it is not subject to appeal.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.